Supreme Court, U.S.
FILED

94 784 OCT 24 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE TOWN OF LONGBOAT KEY,

Petitioner,

v.

THE RESERVE, LTD.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

NANCY E. STROUD
Counsel of Record
EDWARD F. RYAN
PETER H. RACHMAN
Burke, Weaver & Prell
1900 Glades Road, Suite 350
Boca Raton, Florida 33431
(407) 391-0400

DAVID P. PERSSON
Davis, Persson, Smith & Darnell
2033 Main Street, Suite 406
Sarasota, Florida 34237

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

105 pp

QUESTION PRESENTED

Does the allegation of a Fourteenth Amendment protectable property interest in a building permit based on the state law doctrine of equitable estoppel properly invoke substantive due process analysis?

LIST OF PARTIES*

In the proceeding below TOWN OF LONGBOAT KEY was the Defendant and in this proceeding is the Petitioner. In the proceeding below The RESERVE, LTD. was the Plaintiff and in this proceeding is the Respondent.

---

* This list also satisfies Supreme Court Rule 29.1; the corporate parties hereto have no known parent or subsidiary corporations.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of the Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	4
Introduction	4
I.	
The circuits are split on the propriety of applying substantive due process analysis in land use cases where there is an alleged Fourteenth Amendment protectable property interest	7
II.	
This Court should hold that where the local government possesses discretion in land use matters and state equitable estoppel principles apply, as a matter of law substantive due process analysis is not proper	10
III.	
In the instant case, the Circuit Court wrongly held that Reserve has a Fourteenth Amendment protectable property interest	14
Conclusion	19
Appendix	App. 1

TABLE OF AUTHORITIES

CASES:	PAGE
Albery v. Reddig, 718 F.2d 245 (7th Cir. 1983) ..	12
Amsden v. Moran, 904 F.2d 748 (1st Cir.), *cert. denied*, 498 U.S. 1041 (1990)	13
Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) .	17
Board of Regents v. Roth, 408 U.S. 564 (1972) ..	8, 9, 10
Chiplan Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983)	8, 13
City of Boynton Beach v. Carroll, 272 So.2d 171 (Fla. 4th DCA), *cert. denied*, 279 So.2d 871 (Fla. 1973)	14
City of Hollywood v. Hollywood Beach Hotel Co., 283 So.2d 867 (Fla. 4th DCA), *aff'd in part, rev'd in part*, 329 So.2d 10 (Fla. 1976)	15
Collins v. The City of Harker Heights, Tex, ____ U.S. ____, 112 S.Ct. 1061 (1992)	12
Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1989)	4
Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1400 (1994)	12
Couf v. DeBlaker, 652 F.2d 585 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 921 (1982)	18
Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982)	4, 7
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) .	11
Gamble v. Eau Claire County, 5 F.3d 285 (7th Cir. 1993)	4, 6, 7
Greenbrier v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989)	7, 17

Gross v. City of Riviera Beach, 367 So.2d 648 (Fla. 4th DCA 1979) 17

Gunkel v. City of Emporia Kan., 835 F.2d 1302 (10th Cir. 1987) 12

Harrah Independent School District v. Martin, 440 U.S. 194 (1979) 13

Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982) 8

Hy Kom Dev. Co. v. Manatee County, 837 F.Supp. 1182 (M.D. Fla. 1993) 11

Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991) 7

Josephson v. Autrey, 96 So.2d 784 (Fla. 1957) ... 17

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) . 5, 8

MacKenzie v. Rockledge, 920 F.2d 1554 (11th Cir. 1991) 15

Marine One, Inc. v. Manatee County, 877 F.2d 892 (11th Cir. 1989), *rehearing denied*, 898 F.2d 1490 (11th Cir. 1990) 14

Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1990) 14, 15

Miami Shores Village v. Wm. N. Brockway Post No. 124, 24 So.2d 33 (Fla. 1945) 14

Molgaard v. Town of Caledonia, 527 F.Supp. 1073, *aff'd per curiam*, 696 F.2d 58 (7th Cir. 1981) . 16

Monroe County v. Hemisphere Equity Realty, 634 So.2d 745 (Fla. 3rd DCA 1994) 15

Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S. 906 (1987) 8

Paul v. Davis, 424 U.S. 693 (1976) 13

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 4, 6, 7

Raskiewicz v. Town of New Boston, 754 F.2d 38 (1st Cir. 1985) 12

Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374 (11th Cir. 1994) 7, 8, 11, 15

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) 11, 12, 13

River Park, Inc. v. City of Highland Park, 23 F.3d 164 (7th Cir. 1994) 4, 7, 9

RRI Realty Corp., Inc. v. Village of Southhampton, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989) 4, 5, 6, 7, 8, 10

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) 6

Shelton v. City of College Station, 780 F.2d 475 *cert. denied*, 477 U.S. 905 (5th Cir. 1986) 7, 18

Smithfield Concerned Citizens v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990) 9

Snowder v. Hughes, 321 U.S. 1 (1944) 13

South Gwinnet Venture v. Pruitt, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 837 (1974) . 18

Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989) 6, 12, 18

Sylvia Dev. Corp. v. Calvert County, 842 F.Supp. 183 (D.Md. 1994) 18

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) . 11

Villas of Lake Jackson, Ltd. v. Leon County, 796 F.Supp. 1477 (N.D.Fla. 1992) 11

Zinermon v. Burch, 494 U.S. 113 (1990) 11

PROVISION OF
UNITED STATES CONSTITUTION:

U.S. Constitution Amendment XIV ..... App. 72

STATUTES:

Longboat Key Code, Sections 150.34(B) and (C) (previously codified as Longboat Key Code, Section 150.040(A)) ..... App. 72

Longboat Key Code, Section 158.032 ..... App. 73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE TOWN OF LONGBOAT KEY,

Petitioner,

v.

THE RESERVE, LTD.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner, Town of Longboat Key, seeks review of the Circuit Court's judgment which held, **inter alia**, that Respondent, The Reserve, Ltd., had a protectable property interest in a revoked building permit pursuant to the Fourteenth Amendment to the United States Constitution (U.S. CONST. AMEND. XIV). The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit is published in the Federal Reporter at 17 F.3d 1374 (11th Cir. 1994). It is attached as Appendix "A". The opinion of the U.S. District Court for the Middle District of Florida was affirmed in part, vacated in part and the cause was remanded. The District Court opinion was not published. It is attached as Appendix "B".

JURISDICTION

The opinion and judgment of the U.S. Court of Appeals were entered on April 1, 1994. The petition for rehearing was denied on July 28, 1994.

Petitioner seeks review pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV; Longboat Key Code, Sections 150.34(B) & (C); and Longboat Key Code, Section 158.032, are set out in Appendix EE.

STATEMENT OF THE CASE

The District Court accepted jurisdiction pursuant to 28 U.S.C. § 1331.

On February 3, 1987, Reserve obtained a building permit to construct a shell building for a fifty-seven unit condominium and spa on the subject property. When Reserve obtained its building permit, the Town Code provided in Section 150.34(B) (previously codified as §150.040(A)) that a building permit shall be revoked if, after construction commences, no substantial work has been accomplished in any thirty-day period.

On May 10, 1988, the Town's Director of Public Works ("Director") wrote to Reserve warning that it had not completed "substantial work" in the last thirty-four days and that it had until June 5, 1988 to accomplish "substantial work" or the shell building permit would be revoked. In fact, other than site preparation and demolition, no significant construction work had been accomplished at all. Reserve contacted the Director on May 10, 1988 to determine what he would consider to be substantial work and was told by him that five pile caps would be considered substantial work. No pile caps were completed by June 5, 1988 and on June 6, 1988, the Director revoked the building permit pursuant to Longboat Key Code Section 150.34(B). The letter of revocation also informed Reserve of the Town's revalidation procedures.

Several sections of the Town Code provide relief to Reserve for the revocation of the permit. Section 150.34(C) of the Code provides that a building permit may be revalidated by the Director after revocation for "just cause". Section 158.032 of the Code permits any person who is in doubt as to whether rights have vested for a proposed development to obtain a vested rights determination from the Town Commission. Reserve did not apply to the Direc-

tor for a revalidation of the permit under Section 150.34(C), nor did it request a determination of vested rights as provided for under Section 158.032 of the Code.

After revocation of the building permit, it is undisputed that Reserve never sought a Town Commission vote regarding the return of its building permit. Reserve claims that the Town's revocation of its building permit violated a protected property interest under the Fourteenth Amendment of the United States Constitution. The District Court held that Reserve possessed no protectable property interest in the revoked building permit under Florida law. On appeal, the Circuit Court held that Reserve did have a protectable interest in its revoked building permit based on equitable estoppel. That holding gives rise to this petition for writ of certiorari.

More than eighteen months after filing suit in this case, Reserve requested development approval on the subject property for a tourist residential project with a lower residential density and with associated commercial use. On November 4, 1991, the Town Commission approved the site plan for the new project. In 1993 Reserve sold the disputed real estate to a third party not involved in this litigation.

REASONS FOR GRANTING THE WRIT

Introduction

The Circuit Courts of Appeal are split over when, if ever, to invoke substantive due process analysis in land use cases. *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) (discussing the conflict among the circuits in the proper application of substantive due analysis in land use cases, and holding that substantive due process analysis not applicable in land use cases unless government action is irrational). Certain circuits, such as the Seventh Circuit, appear to have completely abandoned the application of any substantive due process analysis in land use cases. (See e.g. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), where the court held that a person contesting a state or local regulation of the use of land must repair to the state court, regardless of the label "substantive due process" characterizing the claim). See also *Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993) (substantive due process claim regarding revoked building cannot be maintained in federal court). The facts of the instant case are not materially different. See also *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1989) that "local interests which work against plaintiff's plan and which . . . may contravene local ordinances . . . [do] not state a claim of denial of substantive due process." See also *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982).

Other circuits, while not entirely abandoning substantive due process analysis in land use cases, have varying approaches as to the precise test and the conditions of its application. For example, in *RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989) a municipality denied a building permit application after its delay beyond the time

allowed by statute. Though plaintiff claimed that it was entitled to the permit as a matter of state law because the municipality did not act to deny the permit within the statutory period, the court found that the municipality did not infringe on plaintiff's constitutional right because the municipality could have denied the permit during the statutory period. The court held that when the permitting authority possesses discretion no property entitlement exists, hence no substantive due process claim exists.

In the instant case, the Circuit Court applied a variation of substantive due process analysis using a two prong test[1] to determine if: (1) there exists a protectable property interest; and (2) whether the deprivation was for an improper motive and accomplished by arbitrary and capricious means. The Circuit Court in the instant case did not consider that the Town possessed legislative power to revoke Reserve's permit pursuant to its local building code if work is suspended or abandoned for a period of thirty days. There is no question that work was not completed according to the criteria of the local ordinance and the ordinance itself was not challenged. The failure of the Circuit Court to consider the Town's statutory discretion in this land use matter puts it directly at odds with *RRI Realty*, supra. Further, the Court's analysis that a federal entitle-

---

[1] After judgment in the instant case the Eleventh Circuit immediately began to retreat from its application of substantive due process. In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) the Eleventh Circuit admitted that "For ten years . . . the law of this circuit has . . . diverge[d] from Supreme Court precedent and affords protections not provided by the substantive component of the Fourteenth Amendment's Due Process Clause. Today, we return this circuit's due process jurisprudence to a proper footing . . ." *Id.* at 1553. Petitioner urges this Court to ensure that the Eleventh Circuit regains its "proper footing" in the application of substantive process analysis in the land use context.

ment may be created by the application of state equitable estoppel principles to a local land use decision only serves to highlight the discretionary nature of the issue involved and thus its appropriate resolution in state, rather than federal court. Thus, the Circuit Court's application of a two prong substantive analysis in the instant case squarely conflicts with the decisions in several other circuits on this issue, including the decisions of the seventh, sixth and second circuits in *Gamble*, *Pearson*, and *RRI Realty*, respectively.[2]

The Circuit Court's holding in the instant case usurps local permitting authorities of their democratic mandate and legislative power. It also unnecessarily entangles federal courts in the quagmire of sometimes incoherent or undeveloped state law. The Circuit Court's holding and analysis ensures into perpetuity that federal courts act as zoning boards of appeal.

To prevent the uneven application of the protection afforded by the substantive due process clause of the Fourteenth Amendment, this Court must uphold a uniform minimum threshold standard that applies substantive due process only in truly egregious cases, not cases involving the application of state or local discretion to land use issues. The current state of the law results in a disruption of local government land use planning and zoning, unfairness and uncertainty to litigants across the county, and the

---

[2] The circuit courts have stated that the substantive due process analysis that applies to zoning cases also applies to building permit cases. *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989). Therefore, the same conflict exists between the circuits with respect to building permit cases as well. See also *Scott v. Greenville County* 716 F.2d 1409 (4th Cir. 1983) (stating that federal courts should not sit as zoning boards of appeal in the context of a building permit case).

unnecessary entanglement of federal courts in state zoning and use law. This case in particular does not meet any such minimum threshold of a substantive due process violation.

I.

The circuits are split on the propriety of applying substantive due process analysis in land use cases where there is an alleged Fourteenth Amendment protectable property interest.

The split between the circuits on the proper role of substantive due process in land use cases occurs over when to apply it and what it constitutes. Several circuits sparingly, if ever, apply substantive due process analysis in land use cases. *Pearson*, supra, citing to *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986) (holding that substantive due process challenges in land use cases are subject to the "legislative" standard of review and thus such attacks will only be successful if there is not a conceivable rational relationship to a legitimate government interest). See also *RRI Realty*, supra, *Gamble*, supra, *River Park, Inc.*, supra, *Creative Environments*, supra, and *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991), citing to *RRI Realty*, supra, with approval for the proposition that where government possesses discretion its "decision making lacks sufficient substantive limitations to invoke due process guarantees."

When the courts do decide that substantive due process analysis is proper, implementation varies dramatically, as demonstrated in the instant case. In the instant case the Circuit Court implemented a two prong version of the substantive due process test. *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374 (11th Cir. 1994), citing to *Greenbrier v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989). That two part test involves: (1) determining if there is a constitution-

ally protectable property interest at issue; and (2) "was the deprivation of that 'property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis [?]' " *Reserve* at 1379, citing to *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982).

The court in the instant case concluded that Reserve did have a protectable property interest in its revoked building permit, by examining Florida state law under guidelines set forth for determining the definition of a protectable property interest announced by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972).[3] *Reserve* at 1380.

Other circuits implement substantive due process analysis by simply assuming that the plaintiff possesses a protectable property interest, and immediately proceed to analyze whether the zoning or permitting authority acted in an arbitrary and capricious manner so as to violate plaintiff's substantive due process rights. *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3rd Cir.), *cert. denied*, 482 U.S. 906 (1987), *Chiplan Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983). Hence these circuits have abandoned the *Roth* entitlement analysis in substantive due process land use cases. *RRI Realty*, supra at 916.

In contrast to the Eleventh Circuit, the Second Circuit reviews entitlement under the standard that if the permit-

---

[3] Arguably the guideline in *Roth*, to determine the existence of a protectable property interest one must look to sources of law independent of the United States Constitution, is not applicable to the instant case. *Roth* concerned procedural due process, whereas the instant case involves substantive due process. Thus the rights protected by the United States Constitution should emanate from that instrument, not from a secondary source. See also *RRI Realty* 870 F.2d at n.2 and *McKinney v. Pate*, supra.

ting authority has any discretion, no protectable property interest will be found. That court reasoned that under the *Roth* entitlement analysis:

> "Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest. . . . the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise . . ."

Id. at 918.

The facts of the instant case would not invoke substantive due process analysis in the Second Circuit. The Town, the permitting authority, had discretion to revoke Reserve's building permit pursuant to Longboat Key Code Section 150.34(B). It also has discretion under its local code to reinstate the permit if requested pursuant to Longboat Key Code Section 158.032. Instead of invoking the remedies for reinstatement, Reserve chose to argue its "entitlement" in federal court.

The instant case, if decided under the law of the Seventh Circuit, would have been summarily drummed out of federal court. The Seventh Circuit will not hear local land use substantive due process cases. *River Park Inc.*, supra. The facts in the instant case, if applied in the First Circuit, also would not invoke substantive due process analysis. The court in *Smithfield Concerned Citizens v. Town of Smithfield*, 907 F.2d 239 (1st Cir. 1990) held that substantive due process claims are only meritorious when there is no "*conceivable* rational relationship between the zoning ordinance and legitimate governmental ends." *Id.* at 244 (citations omitted). That case involved the Town Council's adoption of a comprehensive zoning plan which changed plaintiffs' zoning status from commercial to mostly residential. The pur-

poses of the new zoning included "secur[ing] safety from fire, panic and other dangers; . . . and encouraging the most appropriate use of land throughout the Town." *Id.* at 244 n.6. Certainly Longboat Key Code Section 150.34(B) has a similar conceivable rational relationship to legitimate governmental ends (e.g. aesthetics, preventing attractive nuisance, etc.); this purpose of the code was not even in dispute. Thus a substantive due process claim on the facts of the instant case, if adjudicated under the standard in the First Circuit, would have been dismissed in favor of the Town without hesitation.

II.

This Court should hold that where the local government possesses discretion in land use matters and state equitable estoppel principles apply, as a matter of law substantive due process analysis is not proper.

This Court should adopt and build on the Second Circuit standard to determine when to apply substantive due process analysis in land use cases so that where the local government has discretion in a land use matter and state equitable estoppel principles apply a substantive due process claim will not stand. See *RRI Realty*, supra.

This Court need not to overrule any of its prior holdings to implement this suggestion; it simply needs to define the minimum threshold needed to invoke substantive due process analysis in land use cases. Even if the *Roth* entitlement analysis is applicable to substantive due process analysis in the land use context, there must be limits on its application; otherwise, absurd and unintended results will follow, such as in the instant case where a state law equitable doctrine created a federally protectable property interest. The federal courts should decline to interpret state law to determine federal rights in these types of land use cases.

The Second Circuit substantive due process analysis is the most appropriate to adopt as the overarching federal standard for several reasons. First, the Second Circuit does not wholly abandon substantive due process analysis, but reserves it for truly egregious cases of abuse of governmental power. This select, but even application of substantive due process conforms to this Court's opinion in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) as well as other non land use cases[4] which validate the continuing, if spartan, application of the doctrine.

Second, adopting the Second Circuit analysis will greatly curtail the need for federal courts to delve into the quagmire of state laws which may be unclear in defining a property interest. Confusion between and within the laws of particular states makes it impossible to implement the Eleventh Circuit's two prong substantive due process test in a consistent manner. The Circuit Court in the instant case admits its own confusion regarding Florida law on this point. *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d at 1379. See also *Hy Kom Dev. Co. v. Manatee County*, 837 F.Supp. 1182 (M.D. Fla. 1993); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F.Supp. 1477 (N.D. Fla. 1992).

Third, adopting the Second Circuit analysis will permit local permitting authorities to exercise their legislative prerogative without undue federal interference, and it will prevent federal courts from sitting as zoning boards of appeal. "Our role is not and should not be to sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S.

---

[4] See *Zinermon v. Burch*, 494 U.S. 113 (1990) (applying substantive due process analysis in mental illness voluntary confinement issue); *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (reaffirming the vitality of substantive due process analysis while declining to apply it in context of University Administrative procedures).

1, 13 (1974). See also *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1389 (11th Cir. 1993), citing to *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985) ("federal courts do not sit as a super zoning board or zoning board of appeals"); *Albery v. Reddig*, 718 F.2d 245 (7th Cir. 1983) (federal appeals court should not become accustomed to idea that constitutional rights are implicated in quarrel over zoning rules). See also *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989); *Gunkel v. City of Emporia Kan.*, 835 F.2d 1302 at 1305 (10th Cir. 1987) (stating in the context of a building permit revocation case that "We decline to sit as a zoning board of appeals when presented with claims which, although couched in constitutional language, at bottom only amount to the run of the mill dispute between a developer and a town planning agency.")

Fourth, federal courts have repeatedly indicated that they abhor review of these types of cases and they do not want to expand the application of substantive due process analysis. The dangers of permitting the expansion in substantive due process analysis were noted by this Court recently when it stated: "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guide-posts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. The City of Harker Heights, Tex*, 112 S.Ct. 1061, 1068 (1992), citing to *Regents of University of Michigan v. Ewing*, supra, at 225-26. Adopting the Second Circuit analysis will stem the expansive potential of this doctrine.

Adopting the Second Circuit analysis will ensure that local zoning disputes without constitutional stature will not clog the overburdened federal court system. In the Eleventh Circuit there is no screening to determine if substantive due process analysis is applicable. Thus every plaintiff who can scribble "Fourteenth Amendment protectable property

interest violation" on a complaint turns a local dispute into a federal case.

Even if an ordinance were violated in the instant case, it has been repeatedly held that not every violation of a state statute or local law creates a federal constitutional rights case. *Paul v. Davis*, 424 U.S. 693, 700 (1976). "[T]he claim that denial of the permit was improperly motivated, unsupported by an allegation of the deprivation of a specific constitutional right, simply raises a matter of local concern properly and fully reviewable in the state courts." See also *Chiplan Enterprises v. City of Lebanon*, 712 F.2d 1524, 1527 (1st Cir. 1983); *Amsden v. Moran*, 904 F. 748 at 758 (1st Cir. 1990), where in applying substantive due process analysis in a license revocation case the Court stated it is "plaintiff's burden . . . to show a [substantive] due process deprivation of a constitutional dimension . . . 'mere bad faith refusal to follow state law in . . . local . . . matters . . . simply does not amount to a deprivation of due process where the state courts are available to correct the error.' " (citations omitted).

Hence, even if Reserve was wrongly deprived of a protectable property interest there is no jurisdictional basis for the Federal Courts to adjudicate this matter. State courts are the proper forum in which to seek relief for these disputes which do not rise to a federal constitutional stature. *Snowder v. Hughes*, 321 U.S. 1 (1944). See also *Regents of University of Michigan v. Ewing*, supra, (labeling an interest property does not necessarily afford it the benefits of substantive due process analysis). Cf., *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979). By analogy to the instant case, Reserve's allegation of a protectable property interest, just by virtue of that label, does not merit substantive due process analysis. Adopting the Second Circuit's substantive due process analysis screening

ensures that local zoning and building permit disputes do not automatically become issues of constitutional law.

III.

In the instant case, the Circuit Court wrongly held that the Reserve has a Fourteenth Amendment protectable property interest.

Reserve does not have a protectable property interest in the revoked building permit. Reserve lost the permit as a result of its willful failure to comply with Longboat Key Code Section 150.34(B), which requires that substantial work be completed every thirty (30) days subject to the revocation of the permit.

Even under the two prong substantive due process test which the Circuit Court used in the instant case, Reserve does not have a protectable property interest in the revoked building permit. Florida law clearly mandates that conclusion. Florida law since at least 1945 has held that possession of a building permit does not create a protected property interest. *City of Boynton Beach v. Carroll*, 272 So.2d 171, 173 (Fla. 4th DCA), *cert. denied*, 279 So.2d 871 (Fla. 1973), citing *Miami Shores Village v. Wm. N. Brockway Post No. 124*, 156 Fla. 673, 24 So.2d 33 (Fla. 1945). In *Miami Shores*, the foundation for an American Legion home had been poured when the city council revoked the building permit.

The court in *Boynton Beach* pointed out that, because a building permit under Florida law could be revoked where a zoning law has been amended subsequent to the permit's issuance, then it follows that a mere application for a building permit did not create protected rights. This Circuit's holding in *Marine One, Inc. v. Manatee County*, 877 F.2d 892 (11th Cir. 1989), *rehearing denied*, 898 F.2d

1490 (11th Cir. 1990) reinforces the position that Florida law does not accord protected property status to the mere possession of a building permit. *Marine One* properly cites to *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So.2d 867 (Fla. 4th DCA 1973), *aff'd in part, rev'd in part*, 329 So.2d 10 (Fla. 1976). *City of Hollywood* stands for the principle that there is no property right to possession of a building permit.

Despite the Circuit Court's own admission that it was confused in the instant case, it ignores its own binding precedent, specifically, its holding in *Marine One, Inc.*. The Circuit Court rationalizes its decision by stating that the subsequent case of *Marine One (II)*, (*Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990)) limited the holding in *Marine I* to the proposition that "Florida law does not create a property permit right to build on public land." *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d at 1379. The Circuit Court never overruled *Marine One I* and in fact relied on it in *MacKenzie v. Rockledge*, 920 F.2d 1554 (11th Cir. 1991) after issuing its opinion in *Marine One (II)*, for the proposition that neither possession of a building permit nor its revocation creates a protected property interest.

Another Florida Court, even after the holding in the instant case, recently reaffirmed that there is no protected property interest in the possession of a building permit, even on private land. The court in *Monroe County v. Hemisphere Equity Realty*, 634 So.2d 745 (Fla.3d DCA 1994) held that equitable estoppel did not apply to the termination of a building permit. The permit was terminated pursuant to a county ordinance which required that construction be completed within two years of issuance of the permit. After the termination the County erroneously issued another building permit to claimant. Despite the fact that the ordi-

nance had never been previously enforced in its twelve year existence, the court held that equitable estoppel did not apply and the County's termination of the permit was proper. Also compare the holding in the instant case to *Molgaard v. Town of Caledonia*, 527 F.Supp. 1073 aff'd *per curiam* 696 F.2d 58 (7th Cir. 1981) (holding no due process violation in revoking plaintiff's building permit despite allegation of equitable estoppel).

In the instant case, the Circuit Court concluded that Reserve spent approximately six million dollars on the subject property so that equitable estoppel theory would apply, giving Reserve a vested right under Florida state law. Those conclusions are wrong. (See appendix DD. See also record at R-1 and R-37 para. 22, 24, 25, 38 and 39. In its answer the Town repeatedly denies Reserve's allegations regarding vested rights.) The District Court decided this case on summary judgment. Among the disputed facts were the amount Reserve spent with regard to the building permit itself and whether any expenditure was made in reliance on the building permit. The Circuit Court jumped to the conclusion that equitable estoppel applied here when the procedural posture of that issue made that conclusion inappropriate and incorrect. The most the Circuit Court should have done is simply remand the cause on those disputed issues for further proceedings.

The Circuit Court also erred by failing to consider that Reserve knowingly violated the terms of the permit, which was the basis for its revocation pursuant to Longboat Key Code Section 150.34(B). Reserve's permit was conditioned upon compliance with the Town Code relating to building permits. It is undisputed that Reserve was apprised of the code and what constituted substantial work, yet it failed to take action to preserve its conditional permit.

Reserve's position is identical to that of the plaintiff in *Gross v. City of Riviera Beach*, 367 So.2d 648 (Fla. 4th DCA 1979). *Gross* held that the plaintiff's failure to exercise its power to complete a construction project caused the lapse of its building permits. The court found that the plaintiff could not claim good faith reliance, and therefore the City was not estopped from voiding the building permit for lack of work and requiring the project to come into compliance with current ordinances. *Id.* at 651. In the instant case Reserve also failed to take the necessary steps to prevent revocation of the building permit. It cannot therefore claim good faith reliance and estop the Town from enforcing its code.

It is well established under Florida law that if a property owner creates its claimed hardship, it should not be permitted to take advantage of it. *Josephson v. Autrey*, 96 So.2d 784 (Fla. 1957). The undisputed facts show that although Reserve was notified in writing of the pending enforcement of the Town Code, including a specific completion time, and was further orally notified of the level of work required after its inquiry to the Town, it did not accomplish the minimal required work within the required time period.

Finally, the Circuit Court's remand of this case to determine if the Town acted in an arbitrary and capricious manner is in error. ". . . [T]he ultimate issue of whether a zoning decision is arbitrary and capricious is a question of law to be determined by the Court". *Greenbrier, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1578 n.15 (11th Cir. 1989), citing to *Bateson v. Geisse*, 857 F.2d 1300, 1302-03 (9th Cir. 1988). The Circuit Court should have concluded that the Town did not act in an arbitrary and capricious fashion even under the two prong substantive due process test. The Eleventh Circuit itself has held that it "is a constitutionally permissible objective" to further the goals that placing time

limits on building permits achieves (i.e. problems with aesthetics, vandalism, and "attractive nuisance" concerns among others). *Spence v. Zimmerman*, supra at 260. Thus, though the District Court did not consider if the Town acted in an arbitrary and capricious manner, the Circuit Court[5] should have made the determination because it involves an issue of law, not of fact.

Further, the Town's actions are "entitled to a presumption of validity". *Couf v. DeBlaker*, 652 F.2d 585, 588 (5th Cir. Unit B 1981), *cert. denied* 455 U.S. 921 (1982), quoting *South Gwinnet Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir. 1974) (en banc), *cert. denied* 419 U.S. 837 (1974). The Circuit Court in the instant case failed to acknowledge the presumption of validity as well as Reserve's heavy burden to overcome that presumption. The fact that there was a substantial rational basis for the Town's decision also meant that as a matter of law the Circuit Court should have disposed of this matter by simply affirming the summary judgment of the District Court. *Shelton v. City of College Station*, 780 F.2d 475, 480 (5th Cir. 1986); see also *Sylvia Dev. Corp. v. Calvert County,* 842 F.Supp. 183 (D.Md. 1994).

---

[5] The District Court did not need to decide whether the Town acted in an arbitrary and capricious manner because it rightfully concluded that Reserve did not have a protectable property interest and thus it was pointless to explore the second prong of the two prong substantive due process test.

CONCLUSION

For the foregoing reasons, Petitioner, Town of Longboat Key, prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit for the purpose of reviewing and reversing the holding of that court on Counts II, III, and IV of Reserve's Complaint.

Respectfully submitted,

NANCY E. STROUD
Counsel of Record
EDWARD F. RYAN
PETER H. RACHMAN
Burke, Weaver & Prell
1900 Glades Road, Suite 350
Boca Raton, Florida 33431
(407) 391-0400

DAVID P. PERSSON
Davis, Persson, Smith & Darnell
2033 Main Street, Suite 406
Sarasota, Florida 34237

Attorneys for Petitioner

APPENDICES

INDEX TO APPENDICES

	APP. PAGE
A— Eleventh Circuit Court Opinion Dated April 1, 1994	1
B— Order of U.S. District Court for the Middle District Florida Dated January 23, 1992	21
C— Order of the U.S. District Court for the Eleventh Circuit Dated March 4, 1994	29
D— Judgment of the U.S. District Court for the Eleventh Circuit Dated April 1, 1994	30
E— Order of the U.S. District Court for the Eleventh Circuit Dated April 29, 1994	32
F— Order of the U.S. District Court for the Eleventh Circuit Dated July 28, 1994 (Date Motion for Rehearing Denied)	33
G— Order of the U.S. District Court for the Eleventh Circuit Dated September 9, 1994	34
H— Order of the U.S. District Court for the Eleventh Circuit Dated October 30, 1992	35
I— Order of U.S. District Court for the Middle District of Florida Dated January 30, 1992	36
J— Order of U.S. District Court for the Middle District of Florida Dated January 30, 1992	37
K— Order of U.S. District Court for the Middle District of Florida Dated August 17, 1992	39
L— Order of U.S. District Court for the Middle District of Florida Dated December 20, 1991	41

M—Order of U.S. District Court for the Middle District of Florida Dated November 25, 1991 .. 42

N—Order of U.S. District Court for the Middle District of Florida Dated November 4, 1991 .. 44

O—Order of U.S. District Court for the Middle District of Florida Dated July 29, 1991 45

P—Order of U.S. District Court for the Middle District of Florida Dated June 13, 1991 47

Q—Order of U.S. District Court for the Middle District of Florida Dated June 6, 1991 49

R—Order of U.S. District Court for the Middle District of Florida Dated May 16, 1991 51

S—Order of U.S. District Court for the Middle District of Florida Dated March 21, 1991 .. 54

T—Order of U.S. District Court for the Middle District of Florida Dated March 13, 1991 .. 56

U—Order of U.S. District Court for the Middle District of Florida Dated February 27, 1991 .. 57

V—Order of U.S. District Court for the Middle District of Florida Dated December 19, 1990 .. 58

W—Order of U.S. District Court for the Middle District of Florida Dated October 10, 1990 ... 59

X—Order of U.S. District Court for the Middle District of Florida Dated April 26, 1990 ... 62

Y—Order of U.S. District Court for the Middle District of Florida Dated April 25, 1990 ... 64

Z—Order of U.S. District Court for the Middle District of Florida Dated April 12, 1990 ... 65

AA—Order of U.S. District Court for the Middle District of Florida Dated February 14, 1990 . 66

BB—Order of U.S. District Court for the Middle District of Florida Dated December 12, 1991 . 67

CC—Statutory Provisions Involved 69

DD—Composite of Various Pages of Pretrial Stipulation 72

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

The RESERVE, LTD.,
Plaintiff-Appellant,

v.

TOWN OF LONGBOAT KEY,
Defendant-Appellee.

United States Court of Appeals,
Eleventh Circuit.

April 1, 1994

Donald Edward Hemke, Alan C. Sundberg, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, PA, Thomas J. Roehn, Annis, Mitchell, Cockey, Edwards & Roehn, PA, Tampa, FL, for plaintiff-appellant.

David P. Persson, Davis, Persson & Smith, Sarasota, FL, Edward F. Ryan, Nancy E. Stroud, Burke, Bosselman & Weaver, Boca Raton, FL, for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before, COX, Circuit Judge, JOHNSON, Senior Circuit Judge, and ATKINS*, Senior District Judge.

COX, Circuit Judge:

The Reserve, Ltd., a Florida limited partnership (the "Reserve"), appeals the grant of summary judgment in

---

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

favor of the Town of Longboat Key ("Longboat Key"). We affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND[1]

Reserve sought to construct a spa complex in Longboat Key. In 1986, Longboat Key approved the first of several site plans for the complex. (R.1-1 at Ex.B).[2] Thereafter, Reserve acquired eight acres in Longboat Key upon which to build the proposed complex. Reserve obtained a building permit from Longboat Key to construct fifty-seven condominium units and a spa ("permit"). (R. 1-1 at Ex. D).[3] At the time, section 150.40(A) of the Longboat Key Code provided that a permit would be revoked if, after construction commenced, no "substantial work" was accomplished in any thirty day period.[4] Reserve contends that it spent approximately $6 million in acquiring acreage, designing the complex, demolishing pre-existing buildings on the site, site work, and construction costs. (Appellant's Br. at 10).[5]

---

[1] The facts are undisputed unless otherwise noted.

[2] Longboat Key approved a revised site plan in 1987 (R. 1-1 at Ex. F,G).

[3] Reserve secured other building permits from Longboat Key that are not material to this appeal. (R. 1-1 at Ex. E, H).

[4] While Reserve's permit was active, section 150.40(A) was readopted as section 150.34(B) of the Longboat Key Code. Section 150.34(B) retained the "substantial work" standard for revocation of building permits: "Construction shall be deemed to have been '*SUSPENDED*' or '*ABANDONED*' when no substantial work has been accomplished in any 30-day period." (R. 2-58 at Attach. B, Ex. B).

[5] It is undisputed that Reserve expended large sums on the spa project.

Throughout the 1980's, Reserve's principal, Dr. Murray Klauber ("Dr. Klauber"), was involved in numerous disputes with Longboat Key over matters unrelated to the spa project. (Klauber Apr. 30, 1991 Dep. at 38-94). In addition, Dr. Klauber was active in politics in Longboat, Key in the 1980's. (*Id.* at 65, 142-44, 168-72; Klauber May 15, 1991 Dep. at 537-39, 541-43). Beginning as early as 1984, Dr. Klauber opposed the candidacy of several members of the Longboat Key Commission. (*Id.*). By 1988, Dr. Klauber's relationship with Longboat Key was, at best, strained.

On May 10, 1988, Longboat Key notified Reserve that "substantial work" had not been completed on the spa complex within the last thirty-four days and warned that Reserve's permit would be revoked if "substantial work" was not accomplished by June 5, 1988. (R. 1-1 at Ex.I). Reserve contacted Longboat Key in order to determine what would constitute "substantial work." Longboat Key informed Reserve that the completion of five pile caps would be considered "substantial work." (Smally Dec. 14, 1990 Dep. at 194-95). Although work was begun on five pile caps, not a single pile cap was completed between May 10, 1988 and June 5, 1988. (R. 2-58 at 2). On June 6, 1988, Longboat Key revoked Reserve's permit for failure to complete "substantial work" on the spa complex within a thirty day period. (R. 1-2 at Ex. J). At the time the permit was revoked, workmen were constructing a pile cap. (Smally Jan. 21, 1991 Dep. at 73).

Reserve, through Klauber and its attorneys, informally approached Longboat Key officials on several occasions in an endeavor to have its permit restored. (R. 1-1 at Ex. K; R. 2-67 at Ex. A, Ex. D: Klauber May 1, 1991 Dep. at 396-99). Those officials refused to reinstate Reserve's

permit. (*Id.*)[6] In addition, the Longboat Key Commission called on the letter of credit Reserve posted as a site restoration bond. (Klauber May 15, 1991 Dep. at 447-48). Ultimately, Reserve restored the site and discontinued its efforts to build the spa complex. (*Id.*).

Reserve filed a ten count complaint against Longboat Key. (R. 1-2). In Count I, Reserve alleges that the revocation of its permit, pursuant to the "substantial work" standard, violated its procedural due process rights because the "substantial work" standard is unconstitutionally vague. (*Id.* at 8). Count II alleges that Reserve's permit, in which Reserve had a constitutionally protectible property interest, was revoked arbitrarily and irrationally in order to retaliate against Reserve's principal, Dr. Klauber, in violation of Reserve's principal, Dr. Klauber, in violation of Reserve's substantive due process rights. (*Id.* at 9). Count III alleges that in revoking Reserve's permit, Longboat Key treated Reserve differently than other similarly situated developers in violation of Reserve's equal protection rights. (*Id.* at 10). Count IV, which seemingly mirrors Count II, alleges that Reserve's permit was arbitrarily and unreasonably revoked. Counts V through X allege an assortment of other claims against Longboat Key which are not the subject of this appeal. (*Id.* at 11-16).

Longboat Key moved for summary judgment. (R.1-57, 2-58). As to Count I, the district court held that Reserve's procedural due process rights were not violated, concluding that the "substantial work" standard was not unconstitutionally vague. (R.3-87 at 5). As to Counts II, III,

---

[6] We note, parenthetically, that the record is rife with examples of Longboat Key officials openly displaying hostility towards Reserve and its principal regarding the spa project generally, and the restoration of Reserve's permit specifically.

and IV, the district court arrived at two conclusions. First, the district court concluded that summary judgment was due to be denied with respect to Longboat Key's contention that Counts II, III, and IV were not ripe for adjudication "[b]ecause the question of whether the Plaintiff [Reserve] has sought and received a final decision from Longboat Key [regarding the revocation of this permit] presents a genuine issue of material fact." (*Id.* at 3-4). Second, the district court treated Counts II, III, and IV as "governed by the standards applicable to substantive due process claims." (*Id.* at 6). In order to state a substantive due process claim, a claimant must demonstrate that it has a constitutionally protectible property interest. (*Id*). The district court concluded that Reserve did not have a protectible property interest in its building permit. (*Id.*). Accordingly, the district court granted partial summary judgment as to Counts I through IV in favor of Longboat Key and denied Longboat Key's Motion for Summary Judgment in all other respects. (*Id.* at 8).[7] Reserve filed an Emergency Motion for Rehearing on the Dismissal of Counts I through IV, and in the alternative, a Motion to Certify under 28 U.S.C.A. § 1292(b) (1993). (R. 3-90. The district court denied the motions. (R.4-107). This appeal follows.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1104 (11th Cir. 1990). On review, we are bound by the same stan-

[7] Thereafter, Reserve accepted the district court's offer to allow it to voluntarily dismiss Counts V through X without prejudice and the district court so ordered. (R. 4-105).

dards that governed the district court on the summary judgment motion below. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). Any factual disputes must be resolved in favor of the nonmoving party. *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 609 (11th Cir. 1987).

III. ISSUES ON APPEAL & CONTENTIONS OF THE PARTIES

Reserve advances three arguments pertinent to our resolution of this case. First, Reserve contends that its procedural due process rights were violated because its permit was revoked pursuant to the unconstitutionally vague "substantial work" standard, and the district court erred in holding otherwise. Longboat Key counters that "substantial work" is not unconstitutionally vague and that the grant of summary on Reserve's procedural due process claim in Count I should therefore be affirmed.

Second, Reserve contends that it was denied substantive due process because it was deprived of a constitutionally protectible property interest-its permit-arbitrarily and irrationally, and the district court erred in holding otherwise. Reserve argues that its permit was revoked by Longboat in order to retaliate against its nemesis, Dr. Klauber. Longboat Key counters that Reserve did not have a protectible property interest in its permit and that the grant of summary judgment on Reserve's substantive due process claim in Count II should therefore be affirmed. In the alternative, Longboat Key argues that the record is devoid of evidence to support the contention that Reserve's permit was arbitrarily or irrationally revoked.

Third, Reserve contends that whether or not it had a protectible property interest in its permit is irrelevant to

its equal protection claim in Count III.[8] Reserve claims that the revocation of its permit violated its equal protection rights because other similarly situated developers' permits were not revoked by Longboat Key. Reserve contends that Longboat Key revoked its permit in order to retaliate against Reserve's principal, Dr. Klauber. Longboat Key counters that the record is devoid of evidence to support an equal protection claim and therefore the district court's grant of summary judgment as to Count III should be affirmed.

Finally, Longboat Key contends that even if Reserve's arguments in support of Counts II, III and IV are correct, Counts II, III, and IV are not ripe for adjudication because Reserve never secured a final decision from Longboat Key regarding the propriety of the revocation of its permit. Reserve responds that it did secure a final decision from Longboat Key such that Counts II, III and IV are ripe for adjudication. Alternatively, Reserve argues that even if it failed to secure a final decision from Longboat Key, Counts II, III and IV fall within the futility exception to the ripeness doctrine.

---

[8] Reserve asserts that the existence of a protected property interest is also irrelevant to Count IV. Reserve labels Count IV as a "state pendent law claim." (Appellant's Br. at 4, 23, and 24; R. 3-90 at 2, 6). In addition, the district court refers to Count IV as a state pendent law claim in its order denying Reserve's Emergency Motion for Rehearing on Dismissal of Counts I-IV. (R. 4-107). However, we find nothing in the language of Reserve's complaint generally, or in Count IV specifically, to suggest that Count IV is a state law claim. (R. 1-2 at 11). On appeal, Reserve provides us inadequate guidance to identify the claim asserted in Count IV. As Count IV mirrors Count II, we will treat Count IV as a substantive due process claim.

IV. DISCUSSION

A. PROCEDURAL DUE PROCESS

[1] Reserve contends that the revocation of its permit, pursuant to the "substantial work" standard, violated its procedural due process rights because the "substantial work" standard is unconstitutionally vague. Reserve notes that the Longboat Key Code does not contain guidelines for determining when "substantial work" has been completed, and argues that the term "substantial work," standing alone, is unconstitutionally vague on its face. We disagree.

In determining whether a commercial regulation, such as section 150.34(B), is unconstitutionally vague on its face, we must determine whether the section is "substantially incomprehensible." *See Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 932, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 668-69 (11th Cir. 1984).[9] That is, in order to be unconstitutionally vague the section must be " 'so vague and indefinite as really to be no rule or standard at all.' " *Id.* (citation omitted). We conclude that "substantial work" is not "substantially incomprehensible."

Section 150.34(B) of Longboat Key Code provides: "Construction shall be deemed to have been '*SUSPENDED*' or '*ABANDONED*' when no substantial work has been accomplished in any 30-day period." (R. 2-58 at Attach. B, Ex. B). Upon request, Longboat Key informed Reserve

---

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

that the completion of five pile caps would be considered "substantial work." Hence, "substantial work" was defined for Reserve, as it applied to Reserve at a particular stage of the spa project's development, by Longboat Key officials.

Reserve contends that because "substantial work" had to be defined on a case-by-case basis, "substantial work" is unconstitutionally vague on its face. Reserve proffers no authority that supports that contention, and we decline to give birth to such a rule. Longboat Key issues building permits for a wide range of projects. What constitutes "substantial work" necessarily varies from project to project. *See, e.g., League to Save Lake Tahoe v. Crystal Enter.*, 490 F.Supp. 995, 1000 (D.Nev.1980), *aff'd*, 685 F.2d 1142 (9th Cir.1982) (recognizing that "substantial work," in the permit revocation context, must necessarily be determined on a case-by-case basis). For example, "substantial work" on a major development would be substantially different from "substantial work" on a private residence. In addition, what constitutes "substantial work" depends on the stage of a given project. In its first thirty days, a developer might clear unwanted trees from a site. That same developer might satisfy the "substantial work" requirement at the conclusion of a project by landscaping. Longboat Key need not provide a more definite standard for the revocation of building permits. Accordingly, we affirm the district court's grant of summary judgment as to Count I predicated upon its conclusion that "substantial work" is not unconstitutionally vague such that Reserve's procedural due process rights were violated.

B. SUBSTANTIVE DUE PROCESS

[2] The district court treated Counts II, III, and IV as "governed by the standards applicable to substantive

due process claims." (R. 3-86 at 6). A substantive due process analysis, within the deprivation of a property interest context, involves two queries. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir.1989). First, was the plaintiff deprived of a constitutionally protectible property interest? *Id.* Second, assuming a property interest, was the deprivation of the "property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis[?]" *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982). The district court concluded that Reserve did not have a protectible property interest in the permit and, accordingly, granted summary judgment as to Counts II, III, and IV. (R. 3-86 at 6-8). We conclude that Reserve did have a protectible property interest in its permit and that the district court therefore erred in granting summary judgment on Reserve's substantive due process claims in Counts II and IV.

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). In the instant case, we look to Florida law to determine whether Reserve has a property right in its permit.

This circuit has previously addressed the question of whether, in light of Florida law, a landowner possesses a constitutionally protectible property interest in a building permit. Unfortunately, our previous efforts to answer this question have resulted in some confusion. *See Hy Kom Dev. Co. v. Manatee County*, 837 F.Supp. 1182 (M.D.

Fla.1993) (recognizing that "precedent from the Eleventh Circuit [regarding the question] is difficult to follow and apply"); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F.Supp. 1477 (N.D.Fla.1992) (noting that precedent from the Eleventh Circuit "on the question has been difficult to follow and apply"). Longboat Key points to two decisions by this court wherein we found no constitutionally protectible property interest in a building permit. In *Marine One, Inc. v. Manatee County*, 877 F.2d 892 (11th Cir.1989), we held that "Florida law is clear that there is no property right in possession" of a building permit. *Id.* at 894. However, we went on to recognize that a landowner may "pursue an action for injunctive relief, if the landowner has in good faith made some substantial change in position or has incurred extensive obligations in reliance on" a building permit, but "that Florida law does not provide the ability to recover money damages for rescission of a permit." *Id.* at 894-95. In *Mackenzie v. City of Rockledge*, 920 F.2d 1554 (11th Cir.1991), we reaffirmed *Marine One*, noting that "the holding in *Marine One* is clear; Florida law creates no property interest in the possession of a building permit." *Id.* at 1559.[10]

Longboat Key's reliance on *Marine One* and *Mackenzie*, to support the naked assertion that a landowner does not possess a property right in a building permit under Florida

[10] However, *Mackenzie* also recognized that "the doctrine of equitable estoppel may prevent the arbitrary rescission of a permit." *Mackenzie*, 920 F.2d at 1559. "It is unclear whether the court meant that it was considering a pendent state law equitable estoppel claim or an arbitrary and capricious substantive due process claim. If it was the latter, it was contrary to the reasoning of the first *Marine One* case, which found that the [Florida] state law remedy gave rise to no property interest protected by due process." *Villas of Lake Jackson*, 796 F.Supp at 1487 n.8.

law, is misplaced. *Marine One* was clarified on petition for rehearing in *Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir.1990) ("Marine One II"). In *Marine One II*, this court held that Florida law does not create a property right in a permit to build on *public* land. *Id.* at 1493. Thus, this court narrowed the *Marine One* holding to the public lands context.[11] The *Mackenzie* court did not take cognizance of the *Marine One II* decision.

This court has decided cases in which we concluded that a landowner might have a constitutionally protectible property interest in a building permit. *See, e.g., Spence v. Zimmerman*, 873 F.2d 256 (11th Cir.1989) (agreeing with the Eighth Circuit that were a Florida municipality lacks discretion and must issue a building permit to an applicant who complies with the statutory requirements, and the applicant has met those requirements, a landowner has a protectible property interest in that building permit); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir.1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1743, 104 L.Ed.2d 180 (1989) (holding, without discussing Florida law directly, that a landowner has a constitutionally protectible property right in a proposed development where that landowner obtained building permits and commenced construction only to have the construction halted and the property subsequently rezoned to prohibit the permitted use). More recently, federal district courts in Florida have held that a landowner may have a property

---

[11] On petition for rehearing, petitioner argued that the court's precedent supports "the proposition that in Florida there is a protectable property interest in a building permit." *Id. Marine II* does not address that challenge. Rather, in *Marine Two*, as noted herein, relief was denied solely on the basis that Florida law does not create a protectible property interest in a permit to build on *public* lands. *Id.* at 1493.

right in a building permit under Florida law where the circumstances that give rise to the doctrine of equitable estoppel are present-a landowner, in good faith, makes substantial changes in position, or incurs extensive obligations, in reliance on a building permit. *Hy Kom*, 837 F.Supp. at 1186-87; *Villas of Lake Jackson*, 796 F.Supp. at 1490.

[3] Despite federal courts' varied interpretations of Florida law regarding building permits, Florida courts have consistently held that a landowner has a property right in a building permit "where the landowner possesses a building permit and where the circumstances that give rise to the doctrine of equitable estoppel are present." *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So.2d 867, 869 (Fla. 4th DCA 1973), *aff'd in part, rev'd in part on other grounds*, 329 So.2d 10 (1976); *see also City of Boynton Beach v. Carroll*, 272 So.2d 171, 173 (Fla. 4th DCA), *cert. denied*, 279 So.2d 871 (1973) (holding that *possession* of a building permit does not create a vested right . . . in the absence of circumstances which would give rise to equitable estoppel"). Thus, the question is whether circumstances exist in the instant case that give rise to the doctrine of equitable estoppel, under Florida law, so as to give Reserve a property right in its building permit.

[4] Under Florida law, the doctrine of equitable estoppel may be invoked by a landowner where that landowner, relying "(1) in good faith (2) upon some act or omission of the government[,] (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." *City of Hollywood*, 283 So.2d at 869 (citing *Sakolsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963)). Longboat Key issued

Reserve a building permit. Thereafter, Reserve spent approximately $6 million in acquiring acreage, designing the spa complex, demolishing pre-existing buildings on the site, site work, and construction costs. As Reserve possessed a building permit and expended large sums of money in reliance thereon, under Florida law, Reserve had a vested property right in its permit. *See City of Hollywood*, 283 So.2d at 869; *City of Boynton Beach*, 272 So.2d at 173. Because we conclude that Reserve had a vested property right in its permit under Florida law, we hold that Reserve had a property interest protectible under the Fourteenth Amendment. *See Hearn*, 688 F.2d at 1332. Accordingly, we conclude that the district court erred in granting summary judgment on Reserve's substantive due process claims in Counts II and IV.

As to the second prong of the substantive due process analysis, Longboat Key contends that even if Reserve had a protectible property interest in its permit, the record is devoid of evidence to support Reserve's claim that its permit was arbitrarily and irrationally revoked. Therefore, Longboat Key argues, the district court's grant of summary judgment as to Reserve's substantive due process claim in Count II should be affirmed. The district court did not address this question in considering Longboat Key's Motion for Summary Judgment. Therefore, we decline to reach this issue and do not express an opinion as to its merits. *See Strength v. Hubert*, 854 F.2d 421, 426 (11th Cir.1988) (declining to reach an issue not addressed by the district court).

C. EQUAL PROTECTION

[5] In Count III of its complaint, Reserve alleges that in revoking its permit, Longboat Key treated Reserve differently than other similarly situated developers in viola-

tion of Reserve's equal protection rights. The district court granted summary judgment on Count II predicated upon its conclusion that Reserve does not have a constitutionally protectible property interest in its permit. On appeal, Reserve argues that the establishment of a constitutionally protectible property interest is wholly irrelevant to an equal protection claim. We agree.

[6] An equal protection claim revolves around whether similarly situated persons are treated differently *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). In opposing Longboat Key's Motion for Summary Judgment, Reserve noted several other developers that Longboat Key allowed to retain their permits despite the fact that *no* work was accomplished on their projects for more than thirty days. (R. 2-67 at 4). Thus, Reserve created a disputed issue of fact regarding whether it had been treated differently than other similarly situated developers.

Longboat Key argues, however, that "mere failure to pursue all offenders of an ordinance regulation is not grounds for a claim of denial of equal protection." (Appellee's Br. at 20). We have no quarrel with the law so stated. In order "to prevail on a claim that defendant unequally applied a facially neutral statute, a plaintiff must show intentional discrimination." *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 (11th Cir.1987), *cert. denied*, 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). Reserve contends that Longboat Key revoked its permit in order to retaliate against its principal, Dr. Klauber. There is record evidence to support that contention; a disputed fact, as to the reason for the revocation of Reserve's permit, remains. Accordingly, we conclude that the district court erred in granting summary judgment on Reserve's equal protection claim in Count III.

D. RIPENESS

[7] Longboat Key contends that even if the district court erred in concluding that Reserve had a protectible property interest in its permit, summary judgment as to Counts II, III, and IV should be affirmed because those counts are not ripe for adjudication. In order for Counts II, III, and IV to be ripe for adjudication, Reserve must have secured a "final decision" from Longboat key regarding the revocation of its permit. *See Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir.1990), *cert. denied*, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991); *see also Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3d Cir.), *cert. denied*, ____ U.S. ____, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993). The district court held that "[b]ecause the question of whether the Plaintiff [Reserve] has sought and received a final decision from Longboat Key presents a genuine issue of material fact, the motion is due to be denied with respect to the ripeness argument." (R. 3-87 at 3). The district court concluded that Reserve satisfied the final decision requirement because Reserve informally approached the Longboat Key Commission directly in an endeavor to have its permit returned. We disagree.

Reserve had at least two avenues by which to challenge the revocation of its permit.[12] First, section 150.34(C) of

---

[12] Longboat Key asserts that Reserve had a third avenue by which to challenge the revocation of its permit. Longboat Key contends that Reserve should have had the revocation of its permit reviewed by the Board of Adjustment pursuant to section 150.33 of the Longboat Key Code. (Appellee's Br. at 27). Section 150.33, however, provides for review of the denial of, not the revocation of, a permit. (R 2-58 at Attach. B, Ex. C).

the Longboat Key Code provides that a building permit may be revalidated by Longboat Key's Director of Public Works upon a showing of "just cause." (R.2-58 at Attach. B, Ex. A). Second, section 158.032 of the Longboat Key Code provides for a vested rights determination by the Longboat Key Commission (*Id.* at Attach. B, Ex. B).[13] Reserve never submitted a formal request for revalidation of its permit pursuant to section 150.34(C). (*Id.* at Attach. A).[14] Similarly, Reserve never formally requested a vested rights determination from the Longboat Key Commission pursuant to section 158.032. (*Id.*).[15]

---

[13] Under section 158.032, a property owner may request a determination from the Longboat Key Commission as to whether the owner's rights have vested for a proposed development on the property owned by that person, based on the granting of any development order by the Town or any of its commissioners, agencies of departments . . . ." (R. 2-58 at Attach. B, Ex. B). Vested rights is to be "interpreted to include those rights obtained by a property owner who: (1) in good faith; (2) upon some act of omission of the government; (3) has made such a substantial change in position by incurring such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the acquired right." (*Id.*)

[14] Reserve argues that its insistence that the Public Works Director restore its permit was tantamount to a request for revalidation. (Appellant's Br. at 24). However, Reserve does not contend that it filed a formal request for revalidation under section 150.34(C).

[15] Reserve contends that it repeatedly requested that Longboat Key recognize its rights and restore its permit, that Longboat Key repeatedly declined to reinstate Reserve's permit, and therefore, Longboat Key did determine that Reserve did not have a vested property right in its permit. Reserve points to the Commission's determination that the project site should be restored as evidence of the conclusiveness of the Commission's position regarding Reserve's permit. However, Reserve does not argue that it made a formal request to the Longboat Key Commission for a vested rights determination pursuant to section 158.032.

Reserve did contact Longboat Key on several occasions in an endeavor to have its permit restored. For example, Dr. Klauber met with the Director of Public Works and insisted that Reserve's permit be returned. (Klauber Deposition at 396-99). The Director informed Dr. Klauber that Reserve would not get its permit back. (*Id.*). Reserve, through its attorneys, wrote Longboat Key a series of letters disputing the propriety of Longboat Key's revocation of Reserve's permit. (R. 1-1 at Ex. K, R. 2-67 at Ex. A). In addition, Reserve expressed its willingness "to appear at the Town Commission . . . to discuss the possibility of settlement" so as to avoid litigation. (R. 2-67 at Ex. D). One of Reserve's attorneys, and Dr. Klauber, appeared before the Longboat Key Commission. However, that appearance was for the limited purpose of discussing site restoration, not to determine whether Reserve had a vested property right in its building permit. (Cox Deposition at Ex. 6). A commission did suggest that any agreement on restoration should be linked to a stipulation that "the building permit was canceled and will not be challenged." (*Id.* at 22). However, the Commission did not decide whether such a stipulation was a condition precedent to resolving the dispute over site restoration. (*Id.* at 31-32). Although the Commission discussed Reserve's permit, it never voted on whether the revocation of Reserve's permit was valid.

It is undisputed that Reserve failed to submit a formal request for revalidation of its permit pursuant to section 150.34(C) of the Longboat Key Code. Similarly, it is undisputed that Reserve never formally requested a vested rights determination from the Longboat Key Commission pursuant to section 158.032 of the Longboat Key Code. As noted however, the record is rife with references to informal efforts by Reserve to have its permit returned. Reserve's informal challenges to the revocation of its per-

mit may have rendered a formal request futile, but such efforts are not tantamount to the obtainment of a final decision. Therefore, we find that Reserve did not obtain a final decision from Longboat Key regarding the revocation of its permit and the district court erred in holding otherwise.

Reserve responds that it need not pursue "futile acts" in order to render its claims ripe for adjudication. *See Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516 (11th Cir. 1987).[16] As Longboat Key repeatedly refused to recognize Reserve's rights and restore its permit, Reserve argues, it would have been futile to seek a formal review of the revocation of its permit under section 150.34(C) or section 158.032 of the Longboat Key Code. Therefore, Reserve contends, Counts II, III, and IV fall within the futility exception and are therefore ripe for adjudication.

We do not reach the merits of Reserve's contention that Counts II, III, and IV fall within the futility exception to the ripeness doctrine. The district court did not address that question in considering Longboat Key's Motion for Summary Judgment. Therefore, we decline to determine whether the futility exception applies and leave that question for the district court to grapple with on remand. *See Strength*, 854 F.2d at 426.

---

[16] In Reserve's Memorandum in Opposition to the Longboat Key's motion for Summary Judgment, Reserve argued that "ripeness does not require a landowner to pursue 'futile acts.' " (R. 2-67 at 31). The district court's order, however, is devoid of any reference to the "futility exception" to the ripeness doctrine. (R. 3-87).

V. CONCLUSION

For the foregoing reasons we AFFIRM the district court's grant of summary judgment as to Count I; we VACATE the district court's judgment as to Counts II, III, and IV, and REMAND for further proceedings.

AFFIRMED in part, VACATED in part, and REMANDED for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.

ORDER

This action by a landowner against the town of Longboat Key challenges the constitutionality of certain zoning and building permit activities by the Town. The case is before the Court for consideration of a motion by the Town for summary judgment. The Plaintiff has filed a lengthy response to the motion which devotes considerable attention to issues irrelevant to the disposition of the motion.[1]

Background

In 1986 Plaintiff sought and was granted approval of a site plan by the Town for a "world class spa" and 71 residential units to be constructed on an eight acre parcel of land within the Town. A year later, the Town granted the Plaintiff a building which would contain the spa and

[1] Plaintiff was granted leave to file its response in excess of twenty pages. (Doc. #66)

57 condominium units. Construction of the building commenced in 1988.

On May 10, 1988, the Director of Public Works for the Town notified the Plaintiff that, pursuant to the Town zoning code, the Reserve was in danger of losing its building permit for failure to accomplish "substantial work" on the project for more than thirty days. The Director of Public Works gave the Plaintiff until June 5, 1988 to accomplish "substantial work" on the project, failing which the building permit would be revoked. Following a request for clarification of the definition of "substantial work", the Plaintiff was informed that the deadline would be satisfied if five pile caps were completed by June 5, 1988. Although work on the pile caps was begun, the Plaintiff did not meet the deadline and the building permit was revoked on June 6, 1988.

Plaintiff asserts that the actions by the Town were designed to punish one of the principal partners in the Reserve, Dr. Murray Klauber, for his political activities against several of the Town's commissioners. Plaintiff claims that as a result of the revocation of the building permit, it will be forced to comply with new zoning requirements which provide for a lower density of construction and would render the project economically unfeasible. The Plaintiff has filed a ten count complaint alleging violations of its rights to procedural and substantive due process and to equal protection as well as several pendant state claims.

The Defendant has offered five different arguments in support of its motion for summary judgment. Each will be addressed in turn.

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any ma-

terial fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F. R. Civ. P. In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party." *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The moving party has the initial burden of establishing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Next, the "non-moving party . . . bears the burden of coming forward with sufficient evidence of every element that he or she must prove." *Rollins v. Techsouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

Ripeness

Defendant alleges that the constitutional claims are not ripe for adjudication under *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990). In *Eide* the court examined the various types of constitutional claims available to challenge a zoning ordinance and outlined the ripeness standard for each type. Defendant asserts that for seven of the counts, *Eide* requires the Plaintiff to seek a final decision from the Town regarding the application of zoning regulations to its property. Because the question of whether the Plaintiff has sought and received a final decision from the Town presents a genuine issue of material fact, the motion is due to be denied with respect to the ripeness argument.

Defendant asserts, and the Plaintiff does not dispute, that the Reserve failed to utilize procedures established

in the Town's zoning code for appealing any action taken by a Town official in the enforcement of the zoning code to the Town's Board of Adjustment. Plaintiff, has responded by asserting that several of its representatives went directly to the Town Commission to seek a reversal of the revocation of the building permit. Plaintiff's response designates specific portions of deposition testimony in support of these assertions. Members of the Board of Adjustment are appointed by the Mayor and confirmed by the Town Commission and the Board of Adjustment has no authority to hear appeals from decisions of the Commission. Seeking and receiving a final decision from the Commission, therefore, would seem to satisfy the final decision requirement of *Eide*.

Procedural Due Process

The Defendant seeks the entry of summary judgment on count I of the complaint which alleges a violation of the Plaintiff's right to procedural due process. That count provides two bases for relief: first, that the zoning code's requirement of "substantial work" is unconstitutionally vague; and second, that the Plaintiff was not provided notice or an opportunity to be heard prior to the revocation of the building permit.

The notice and hearing portion of the claim may be disposed of quickly. The Supreme Court has held that such claims may not be brought if the governmental body being sued has provided a meaningful post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 537, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984); *see also, Rymer v. Douglas County*, 764 F.2d 796, 803 (11th Cir. 1985). The Town of Longboat Key's zoning code provides for both appeal to the Board of Adjustment and a right to judicial review of any deci-

sion adverse to a landowner. The motion for summary judgment is due to be granted on this portion of count I.

The Eleventh Circuit has held commercial statutes to a lenient standard of review for vagueness. *Cotton States Mutual Insurance Company v. Anderson*, 749 F.2d 663, 669 (11th Cir. 1984). "Such statutes are impermissibly vague only if they provide no rule or standard at all. Uncertainty . . . is not enough for the commercial regulatory statute to be unconstitutionally vague; rather, it must be substantially incomprehensible." *Id.* (citations omitted). The challenged section of the Town zoning code reads as follows:

> Construction shall be deemed to have been "*SUSPENDED*" or "*ABANDONED*" when no substantial work has been accomplished in any 30-day period.

Town Code of Longboat Key, § 150.34(B). An earlier portion of the code provides for the revocation of building permits when construction has been suspended or abandoned.

The Plaintiff has provided no citation to legal authority in support of its assertion that the code section is unconstitutionally vague. The Court finds that the reference to the accomplishment of substantial work is sufficiently precise and comprehensible to pass constitutional muster. The motion is due to be granted with respect to count I of the complaint.

Substantive Due Process

Defendant asserts, and the Plaintiff does not dispute, that the claims asserted in counts II, III and IV of the complaint are governed by the standards applicable to substantive due process claims. To establish a claim for deprivation of property without substantive due process,

Plaintiff "must demonstrate that (1) he had a constitutionally protected property interest and (2) the government deprived him of that 'interest for an improper motive and be means that were pretextual, arbitrary and capricious.' " *MacKenzie v. City of Rockledge*, 920 F.2d 1554, 1558 (11th Cir. 1991), *quoting, Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989). Because Plaintiff did not have a protectable property interest in the revoked building permit under Florida law, summary judgment is due to be granted with respect to these counts of the complaint.

The determination of whether a plaintiff has a constitutionally protectable property interest is governed by state law, and is a legal question to be decided by the court rather than the fact finder. *Marine One, Inc. v. Manatee Count*, 877 F.2d 892, 894 (11th Cir. 1989). The Eleventh Circuit has held that "Florida law creates no property right in possession of a building permit." *MacKenzie*, 920 F.2d at 1559; *see also, Marine One*, 877 F.2d at 894.

Plaintiff attempts to distinguish this case by arguing that the decisions in which Florida law was held to create no property right all involved building permits on public rather than private land. Plaintiff supports this argument by reference to several Eleventh Circuit decisions, including the denial of a petition for rehearing in *Marine One. Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. Unit B 1981). However, a review of these decisions reveals that they do not support Plaintiff's assertion. None of these decisions directly holds that a building permit creates a prop-

erty interest under Florida law.[2] Further, the seminal state court decision which held that possession of a building permit is not a protectable property interest involved private rather than public land. *City of Boynton Beach v. Carroll*, 272 So.2d 171 (Fla. 4th DCA 1973).

Equitable Estoppel

Counts V and X of the complaint assert pendant state law claims of equitable estoppel. "[T]he doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where 'a property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.' " *Hollywood Beach Hotel Company v. City of Hollywood*, 329 So.2d 10, 15-16 (Fla. 1976) (citations omitted). The motion essentially argues that the Plaintiff brought the building permit revocation and downzoning of the property upon itself by its own actions and not in good faith reliance upon some act of the Town. Defendant cites Florida case law which holds that a plaintiff cannot base an equitable estoppel on a hardship which the plaintiff created himself. *Josephson v. Autrey*, 96 So.2d 784 (Fla. 1957); *Gross v. City of Riviera Beach*, 367 So.2d 648 (Fla. 4th DCA 1979). Although Plaintiff's brief reply to this portion of the motion fails to cite to any legal authority and does not point to evidence in the record which supports this claim, the Court has been able to discern sufficient factual allegations, supported by affidavits and deposition testimony, which demonstrate that there exists a genuine

---

[2] In fact, *Wheeler* was an Alabama case. *Wheeler*, 664 F.2d at 100.

issue of material fact with respect to these two counts of the complaint. Accordingly, the motion is due to be denied with respect to counts V and X.

Arbitrary and Capricious Downzoning

Counts VI, VII and VIII of the complaint allege that the "downzoning" of the Plaintiff's property by the Town was arbitrary and capricious. Defendant's motion simply asserts that "There is not a scintilla of evidence in the record that the legislated density is arbitrary and unreasonable." Plaintiff has responded with designations to portions of the record which may demonstrate that the claims present a genuine issue of material fact to be resolved by the fact finder. The motion is due to be denied with respect to these counts as well.

Accordingly, upon due consideration, it is ORDERED that:

(1) the motion by Defendant for summary judgment (Doc. #57) is GRANTED with respect to counts I through IV of the complaint and those counts of the complaint are DISMISSED with prejudice. In all other respects, the motion is DENIED.

(2) the motion by Defendant to file a reply to the Plaintiff's response to the motion for summary judgment (Doc. #68) is DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 23rd day of January 1992.

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-2149

THE RESERVE, LTD., Plaintiff-Appellant,

versus

TOWN OF LONGBOAT KEY, Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE; COX, Circuit Judge, JOHNSON, Senior Circuit Judge, and ATKINS*, Senior District Judge.

BY THE COURT:

Appellee's motion to strike argument from appellant's citation of supplemental authority, filed with this court on December 10, 1993, is GRANTED.

---

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Filed U.S. Court of Appeals Eleventh Circuit
March 4, 1994
Miguel J. Cortez, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-2149

D.C. Docket No. 90-85-CIV-T-10B

THE RESERVE, LTD.,

Plaintiff-Appellant,

versus

TOWN OF LONGBOAT KEY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE; COX, Circuit Judge, JOHNSON, Senior Circuit Judge, and ATKINS*, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel:

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and VACATED in part; and

that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court:

It is further ordered that each party shall bear their own costs on appeal.

---

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Entered: April 1, 1994
For the Court: Miguel J. Cortez, Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 9/14/94

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-2149

THE RESERVE, LTD.,

Plaintiff-Appellant,

versus

TOWN OF LONGBOAT KEY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

The motion of appellee to strike the supplemental authority of appellant dated February 28, 1994 and March 7, 1994, in their entirety for failure to comply with F.R.A.P. Rule 28(j) is granted.

UNITED STATES CIRCUIT JUDGE

Filed U.S. Court of Appeals Eleventh Circuit
April 29, 1994
Miguel J. Cortez, Clerk

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-2149

THE RESERVE, LTD., Plaintiff-Appellant,

versus

TOWN OF LONGBOAT KEY, Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING

BEFORE; COX, Circuit Judge, JOHNSON, Senior Circuit Judge, and ATKINS*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellee, Town of Longboat Key, is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

---

* Hon. C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Filed U.S. Court of Appeals Eleventh Circuit
July 28, 1994
Miguel J. Cortez, Clerk

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-2149

THE RESERVE, LTD.,

Plaintiff-Appellant,

versus

TOWN OF LONGBOAT KEY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellee's motion to stay the mandate is denied.

UNITED STATES CIRCUIT JUDGE

Filed U.S. Court of Appeals Eleventh Circuit
September 9, 1994
Miguel J. Cortez, Clerk

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-2149

THE RESERVE, LTD., Plaintiff-Appellant,

versus

TOWN OF LONGBOAT KEY, Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellee's motion for leave to strike appellant's reply brief is CARRIED WITH THE CASE.

/s/ PETER T. RAY
UNITED STATES CIRCUIT JUDGE

Filed U.S. Court of Appeals Eleventh Circuit
October 30, 1992
Miguel J. Cortez, Clerk

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

ORDER

The Court having heard arguments on January 27, 1992, on the status of the subject case, the Court having offered plaintiff a dismissal without prejudice under Rule 41(a)(2) on Counts V through X, or in the alternative a trial on Counts V through X for equitable relief only, the Court having heard defendant's opposition to the dismissal without prejudice, plaintiff having chosen to dismiss Counts V through X without prejudice and the Court being otherwise duly advised in the premises, it is hereupon

ORDERED AND ADJUDGED that Counts V through X are hereby dismissed without prejudice.

DONE AND ORDERED at St. Petersburg, Florida, this 30th day of January, 1992.

District Court Judge

cc: Donald E. Hemke
Thomas J. Roehn
Nancy E. Stroud
David P. Persson

APPENDIX J

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.
_____/

ORDER

Before the Court is the Plaintiff's motion (Doc. 90) for reconsideration of the Court's Order (Doc. 87) entered 23 January 1992, or in the alternative, to allow an interlocutory appeal pursuant to 28 U.S.C. §1292(b) and to stay proceedings in this Court during the pendency of the interlocutory appeal, or in the alternative, to continue trial.

By Order (Doc. 87) entered 23 January 1992, the Court granted summary judgment in favor of the Defendant with respect to Count 1 (procedural due process), Count II (Substantive Due Process), Count III (equal protection) and Count IV (pendant state count for arbitrary and capricious conduct).

The motion to reconsider argues that the Plaintiff made substantial progress on its project before the Defendant revoked its building permit, and that this progress, coupled with its building permit created a property interest under Florida law. A review of the cases indicates that this coupling does not create a property right but that it does give rise to an equitable estoppel claim. The order complained of denied the Defendant's motion with regard to

the equitable estoppel claims. In any case, the Plaintiff did not raise this argument in its 38-page memorandum (Doc. 67) in opposition to the motion for summary judgment.

The plaintiff also argues that a property interest is not required to maintain the equal protection and state-law arbitrary and capricious claims. This argument was not raised in the Plaintiff's opposition memorandum.

The Local rules provided the Plaintiff with an opportunity to fully respond to the Defendant's motion for summary judgment. Local Rule 3.01(b). In fact, upon motion by the Plaintiff, the Court relaxed the twenty page limit of Local Rule 3.01(c) and accepted a 38-page memorandum in opposition to the Defendant's motion for summary judgment. That memorandum, in turn, referred to several pages of other argument made in the Plaintiff's memorandum in opposition to the motion to dismiss. As noted in the Order complained of, the Plaintiff devoted "considerable attention to issues irrelevant to the disposition of the motion [for summary judgment]." The Court will not suffer further argument from the Plaintiff on the motion for summary judgment.

The Court has already given due consideration to the arguments made by the Plaintiff with regard to the procedural due process claim.

Upon due consideration, the Plaintiff's motion for reconsideration, and in the alternative, for certification for an interlocutory appeal with a stay pending in this Court pending such an appeal, or in the alternative, for a continuance of trial are DENIED.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 30th day of January, 1992.

UNITED STATES DISTRICT JUDGE

APPENDIX K

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.
_____/

ORDER

This case involved an action by a landowner against the Town of Longboat Key challenging the constitutionality of certain zoning and building permit activities by the Town. By Order entered Feb. 3, 1992, Judge L. Clure Morton[1] dismissed counts V through X of the Plaintiff's complaint (Doc. 105), and ruled in favor of the Defendant as to counts I through IV (Doc. 106). A notice of appeal was filed by Plaintiffs on February 14, 1992 (Doc. 108).

Several post judgment motions have been filed in the case. Upon due consideration, these motions (Docs. 110, 114, and 117) are referred to the United States Magistrate Judge to conduct such proceedings, including evidentiary hearings, as he deems necessary to the making of a report and recommendation on the motions.

---

[1] Judge Morton is a Senior District Judge for the Middle District of Tennessee who presided over this case as a visiting judge.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 17th day of August 1992.

UNITED STATES DISTRICT JUDGE

APPENDIX L

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.
_____/

ORDER

Upon the request of the parties, the date for filing the pre-trial stipulation is hereby EXTENDED to December 31, 1991.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 20th day of December, 1991.

THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX M

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

ORDER

This case is set for trial in January, 1992. On October 16, 1991, the Defendant filed a motion for summary judgment. Plaintiff moved for an extension of time to respond to that motion on October 31, 1991 and, by Order entered November 4, 1991, the Court granted Plaintiff until November 12, 1991 to file its response. The case is before the Court on Plaintiff's motion for a second extension of time.

In its current motion, the Plaintiff sought until November 18, 1991 to respond to the summary judgment motion. The motion states that Plaintiff's counsel has been engaged in two other cases which have taken a great deal of counsel's time. Further Plaintiff claims that several thousand pages of deposition testimony have been taken in this case and, presumably, Plaintiff's counsel must review that testimony in preparing its response to the motion.

Defendant has opposed the motion. Defendant states that it did not oppose the first extension of time requested by Plaintiff, but that the current request is excessive. Defendant also questions the veracity of Plaintiff's assertion that the motion is not interposed for purposes of delay and alleges that Plaintiff seeks to delay the Court's consideration of the motion until the eve of trial. Defendant offers no support for these allegations and does not assert that it would be prejudiced in any way by the extension Plaintiff seeks.

In the meantime, on November 19, 1991, Plaintiff filed a motion for leave to file a memorandum in excess of twenty pages; and, tendered with that motion was a thirty-eight page brief in opposition to the motion for summary judgment. The Plaintiff's motions are GRANTED and the Clerk is directed to file the memorandum received on November 19.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 25th day of November, 1991.

UNITED STATES DISTRICT JUDGE

APPENDIX N

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.
_____/

YOU ARE ADVISED that on the 4th day of November, 1991 the following action was taken by the Court in this case:

DATE MOTION FILED: October 31, 1991.

PLAINTIFF's MOTION (×××)
DEFENDANT'S MOTION ( )

TYPE OF MOTION: Motion for Extension of Time to File Response to Town's Motion for Summary Judgment (Doc. #59)

ACTION TAKEN: GRANTED (××) DENIED ( )

REMARKS: Plaintiff shall have to and including November 12, 1991, to file a response to Defendant's Motion for Summary Judgment.

FOR THE COURT

DATE: November 4, 1991 BY: _____

FOR THE COURT

DATE: November 4, 1991 BY: DEPUTY CLERK

APPENDIX O

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

ORDER

THIS CAUSE coming to be heard upon the following motions of Defendant: (1) Defendant's Motion to Compel Plaintiff's General Partner to Respond to Deposition Questions, (2) Motion of Defendant for Extension of Time to Supplement its Expert Witness List and Answers to Interrogatories, (3) Motion to Compel Plaintiff to Provide its Specification of Damages and to Open Discovery Regarding Plaintiff's Alleged Damages, and the Court having reviewed the motion, supporting memoranda, response to plaintiff, and having heard the argument of counsel and considered the positions of the parties, and being otherwise fully advised in the premises it is: ORDERED AND ADJUDGED:

1. Defendant's Motion to Compel Plaintiff's General Partner to Respond to Deposition Questions is granted.

2. Motion of Defendant for Extension of Time to Supplement its Expert Witness List and Answers to Interrogatories is granted and defendant is given leave to sup-

plement its previously filed expert witness list and answers to interrogatories within sixty days of the date of this Order.

3. Motion to Compel Plaintiff to Provide its Specification of Damages and to Open Discovery Regarding Plaintiff's Alleged Damages is granted only insofar as plaintiff shall give to defendant the following:

a) A computer print-out showing all of plaintiff's out of pocket expenditures claimed as compensatory damages in this action, including payee, date and amount, as promised by plaintiff to defendant;

b) a statement whether the lost profits claimed are gross or net; and

c) the number of years included in the lost profits claimed and the total amount of lost profits claimed in this action.

DONE AND ORDERED at Tampa, Florida this 29th day of July, 1991.

Thomas G. Wilson
United States Magistrate Judge

copies to:
Thomas Roehn
Donald Hemke
Edward F. Ryan
David Persson

APPENDIX P

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.
_____/

ORDER

A hearing was scheduled on June 14, 1991, at 10:00 a.m., to resolve the defendant's Motion to Compel Plaintiff's General Partner to Respond to Deposition Questions (Doc. 42), Motion to Compel Plaintiff to Provide Its Specification of Damages and to Open Discovery Regarding Plaintiff's Alleged Damages (Doc. 44), and Motion of Defendant for Extension of Time to Supplement Its Expert Witness List and Answers to Interrogatories (Doc. 46). Both parties requested that the hearing be continued due to a family emergency involving plaintiff's counsel.

It is, therefore

ORDERED:

That the joint request to continue the hearing set at 10:00 a.m. on June 14, 1991, be, and the same is hereby GRANTED. The hearing is therefore CONTINUED, and the parties shall advise the court, within ten (10) days from the date of this Order, of the status of the motions.

DONE AND ORDERED at Tampa, Florida, this 13th day of June, 1991.

THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX Q

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.
_____/

ORDER

Before the court are defendant's Motion to Compel Plaintiff's General Partner to Respond to Deposition Questions (Doc. 42), Motion to Compel Plaintiff to Provide Its Specification of Damages and to Open Discovery Regarding Plaintiff's Alleged Damages (Doc. 44), and Motion of Defendant for Extension of Time to Supplement Its Expert Witness List and Answers to Interrogatories (Doc. 46). Responses to the motions are not yet due; however, if responses are not timely filed with the court, it will be assumed, in light of Local Rule 3.01(b), that the motions are unopposed, and the motions will be granted. If timely responses are filed, a hearing on the motions will take place **June 14, 1991,** at **10:00 A.M.** in Room **218,** United States Courthouse, 611 North Florida Avenue, Tampa, Florida.

The hearing will be electronically recorded, and a court reporter will not be present. A transcript of the hearing may be obtained through a contract court reporter, but

that court reporter advises us she has difficulty identifying the speakers at the hearing. Therefore, if you desire a transcript of the hearing, you may wish to obtain the services of a court reporter to be present at the expense of the requesting party.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 6th day of June, 1991.

THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX R

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

ORDER LIMITING TIME FOR COMPLETION OF DISCOVERY; SCHEDULING PRETRIAL CONFERENCE AND TRIAL

This cause came on for consideration concerning completion of discovery and the scheduling of pretrial procedures and trial, and the Court having considered the positions of counsel for the parties, it is

ORDERED:

1. The parties are directed to conduct discovery so that the due date of any discovery requested shall not be later than May 17, 1991. Any discovery which would require a later due date shall be permitted only by order of the Court, or by filed stipulation of the parties, and only in cases that will not be delayed for trial. Also, not later than the same date (a) in cases in which any party intends to call an expert witness at trial, such party shall have disclosed the identity of such witness, the subject matter on which such witness is expected to testify, and the substance of the testimony (Rule 26(e)(1)(B) and (3),

F.R. Civ. P.); and (b) in cases in which any party claims money damages, such party shall have disclosed with specificity, and shall thereafter include in the Pretrial Statement, a statement of the elements of each such claim and the amount being sought with respect to each such element.

2. A pretrial conference will be held in the United States Courthouse, Tampa, Florida, on the 16th day of December, 1991, at 9:30, a.m. before Honorable Thomas G. Wilson, United States Magistrate Judge.

3. This case is set for JURY trial during the week(s) of January 6, 13, 20 and 27, 1992.

4. Motions to add additional parties or for summary judgment shall be filed at least sixty (60) days prior to the scheduled trial date. See Rule 4.03, M.D. Fla. Rules.

5. No later than ten (10) days prior to the date of the pretrial conference, counsel for all parties shall meet together, pursuant to arrangements to be made by counsel for the Plaintiff in a good faith effort to accomplish the items of business enumerated in Rule 3.06(b), M.D. Fla. Rules, including the preparation of a Pretrial Statement.

6. The Pretrial Statement shall be prepared in accordance with, and shall contain each of the items prescribed by, Rule 3.06(c), M.D. Fla. Rules.

7. The Pretrial Statement shall be filed at least three (3) days prior to the date of the pretrial conference.

8. In order that the intended purposes of the pretrial procedure are accomplished, all meetings of counsel, including the pretrial conference, shall be attended by counsel who will participate in the trial of the case and is vested with full authority to make and solicit disclosures

and agreements touching all matters pertaining to the trial.

DONE and ORDERED this 16th day of May, 1991.

UNITED STATES DISTRICT JUDGE

TO: Honorable Thomas G. Wilson,
United States Magistrate Judge
Counsel of Record

APPENDIX S

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

ORDER

THIS CAUSE came on to be heard at the time of the scheduled pre-trial conference. Because, as indicated at the hearing, this case is not presently ready for trial, it is appropriate to continue the matter.

It is, therefore, upon consideration

ORDERED:

1. That the Motion to Reschedule Trial (Doc. 289) filed by the Town of Longboat Key be, and the same is hereby GRANTED, and the trial is hereby CONTINUED, to be rescheduled by further order of the court.

2. That, no later than April 8, 1991, the defendant shall serve upon the plaintiff a preliminary list of its witnesses and exhibits. Neither these lists, nor those contained in the plaintiff's proposed pre-trial stipulation, shall be considered final.

3. That, no later than May 10, 1991, the parties shall provide the expert witness information required by the

Order of October 10, 1990, as well as any expert interrogatories which may have been served. Further, by that date, the plaintiff shall file its damage specifications, as required by the Order of October 10, 1990.

4. That the discovery cut-off date is hereby EXTENDED to May 17, 1991, and the due date of any discovery requested must not be later than that date unless permitted by order of the court or by stipulation of the parties.

5. In order to advance the resolution of this case, the plaintiff announced that it would forego filing an amended complaint. Nevertheless, if it appears to the plaintiff that this matter will not be promptly tried, the plaintiff, no later than May 17, 1991, may file an amended complaint as previously authorized. In that event, the discovery cut-off date, as well as any other deadline not reached, shall be rendered inoperative.

DONE AND ORDERED at Tampa, Florida, this 21st day of March, 1991.

THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX T

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

ORDER

This case is before the Court for consideration of pending motions. Upon consideration, it is ORDERED:

1. That the Defendant's motion to dismiss and/or strike and for more definite statement (Doc. No. 5) is in all respects DENIED. See *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971).

2. That the Defendant's motion for leave to file instanter reply (Doc. No. 15) is DENIED as MOOT.

3. That the Plaintiff's motion for leave to file an amended complaint (Doc. No. 22) is GRANTED, and the Plaintiff may file and serve its amended complaint within ten (10) days.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 13th day of March, 1991.

UNITED STATES DISTRICT JUDGE

APPENDIX U

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.
_____/

ORDER

This cause having come on for consideration concerning discovery and the court having reviewed the Stipulated Motion for Extension of Time, it is ORDERED:

1. The parties are directed to conduct discovery so that the due date of any discovery requested shall not be later than March 31, 1991.

DONE and ORDERED this 27th day of February, 1991.

United States District Judge

cc:
Thomas J. Roehn
Annis, Mitchell, et al.
P.O. Box 3433
Tampa, FL 33601

Donald Hemke
Carlton, Fields, et al.
P.O. Box 3239
Tampa, FL 33601

David Persson, Esq.
City Attorney
735 Eighth Street, South
Naples, Florida 33940

Nancy E. Stroud, Esq.
Burke, Bosselman & Weaver
1900 Glades Road, Suite 350
Boca Raton, Florida 33431

APPENDIX V

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

ORDER ON DEFENDANT TOWN OF LONGBOAT KEY'S MOTION FOR SUBSTITUTION OF COUNSEL

This cause came on to be heard upon Defendant Town of Longboat Key's Motion for Substitution of Counsel, and the Court, having reviewed the Motion for Substitution and being fully advised in the premises, IT IS ORDERED that:

Scott R. Christiansen and the law firm of Christiansen, Dehner & Watts be and hereby are relieved of all duties and responsibilities in this matter and David P. Persson of the law firm of Davis & Persson is hereby substituted in their stead.

DONE AND ORDERED IN CHAMBERS IN TAMPA, FLORIDA THIS 19TH DAY OF DECEMBER, 1990.

Wm. Terrell Hodges
United States District Judge

Copy to: Counsel of Record

APPENDIX W

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,
Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,
Defendant.
_____/

ORDER LIMITING TIME FOR COMPLETION OF DISCOVERY; SCHEDULING PRETRIAL CONFERENCE AND TRIAL

ORDER

THIS CAUSE came on for consideration concerning completion of discovery and the scheduling of pre-trial procedures and trial, and the Court having considered the positions of counsel for the parties, it is

ORDERED:

1. The parties are directed to conduct discovery so that the due date of any discovery requested shall not be later than March 1, 1991. Any discovery which would require a later due date shall be permitted only by order of the Court, or by filed stipulation of the parties, and only in cases that will not be delayed for trial. Also, not later than the same date (a) in cases in which any party intends to call an expert witness at trial, such party shall

have disclosed the identity of each such witness, the subject matter on which he is expected to testify, and the substance of his testimony (Rule 26(e)(1)(B) and (3), F. R. Civ. P.); and (b) in cases in which any party claims money damages, such party shall have disclosed with specificity, and shall thereafter include in the pre-trial stipulation, a statement of the elements of each such claim and the amount being sought with respect to each such element.

2. A pre-trial conference will be held in the United States Courthouse, Tampa, Florida, on the 21st day of March, 1991, at 10:00 a.m.

3. This case is set for JURY trial during the week(s) of April 8 and 15, 1991.

4. Motions to add additional parties or for summary judgment shall be filed at least sixty (60) days prior to the scheduled trial date. See Rule 4.03, M. D. Fla. Rules.

5. No later than (10) days prior to the date of the pre-trial conference, counsel for all parties shall meet together pursuant to arrangements to be made by counsel for the Plaintiff, in a good faith effort to accomplish the items of business enumerated in Rule 3.06(b), M. D. Fla. Rules, including the preparation of a pre-trial stipulation.

6. The pre-trial stipulation shall be prepared in accordance with, and shall contain each of the items prescribed by, Rule 3.06(c), M. D. Fla. Rules.

7. The pre-trial stipulation shall be filed at least three (3) days prior to the date of the pre-trial conference.

8. In order that the intended purposes of the pre-trial procedure are accomplished, all meetings of counsel, including the pre-trial conference, shall be attended by counsel who will participate in the trial of the case and

is vested with full authority to make and solicit disclosures and agreements touching all matters pertaining to the trial.

DONE AND ORDERED this 10th day of October, 1990.

William Terrell Hodges
United States District Judge

Thomas J. Roehn, P.O. Box 3433, Tampa, FL 33601
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, FL 33601
Donald E. Hemke, P.O. Box 3239, Tampa, FL 33601
Scott R. Christiansen, 700 Sarasota Quay Sarasota, FL 34236
Nancy E. Stroud, 1900 Glades Road, Suite 350 Boca Raton, FL 33431
Edward F. Ryan, 55 W. Monroe Street, Suite 800 Chicago, IL 60603

APPENDIX X

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

ORDER

It is the practice and policy of the Court, at an early date after the filing of each case, to establish a period of time for completion of discovery and to schedule a pretrial conference and trial. Thus, if the case is not disposed of by ruling on appropriate motions, or by settlement or other means, counsel are given the advantage of the maximum notice possible so as to avoid calendar conflicts and arrange their preparations for trial in an orderly manner. Concomitantly, the Court is better able to plan its trial calendar and manage the allocation of its time with greater efficiency.

Accordingly, counsel for the Plaintiff is hereby directed, within fifteen (15) days from the date hereof, to confer with all other counsel of record and to report to the Clerk of the Court the collective judgment of counsel concerning:

Estimate of time required to complete all discovery	6-8 months

Estimate of time required for trial	5 days
Settlement probability	unknown
Probability of parties consenting to binding arbitration pursuant to Rules 8.02(a)(3) and 8.05(b), M. D. Fla. Rules	none
Probability of parties consenting to trial presided over by United States Magistrate	none
Need, if any, for a pre-trial conference pursuant unknown to Rule 16(a) and (b), F. R. Civ. P.	unknown

This Order, or a copy hereof, shall be signed and utilized by counsel for the Plaintiff in reporting the above information to the Clerk as directed. The Court will then enter an order scheduling the case for pre-trial conference and trial, including specification of a date (normally ten days prior to pre-trial) by which time all discovery must be completed. In the interim, additional hearings on motions or other matters will be scheduled by the Court as necessary.

DONE AND ORDERED this 26th day of April, 1990.

Wm. Terrell Hodges
United States District Judge

Attorney for Plaintiff
Donald E. Hemke
May 23, 1990

APPENDIX Y

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.
_____/

YOU ARE ADVISED that on the 25th day of April, 1990 the following action was taken by the Court in this case:

DATE MOTION FILED: April 18, 1990

PLAINTIFF'S MOTION (××)
DEFENDANT'S MOTION ( )

TYPE OF MOTION: Motion for an Additional Extension of Time to Respond to Town's Motion to Dismiss and/or Strike and for More Definite Statement.

ACTION TAKEN: GRANTED (××) DENIED ( )

REMARKS:

_____

_____

_____

FOR THE COURT

DATE: April 25, 1990 By: DEPUTY CLERK

APPENDIX Z

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

YOU ARE ADVISED that on the 12th day of April, 1990 the following action was taken by the Court in this case:

DATE MOTION FILED: April 9, 1990

PLAINTIFF'S MOTION (××)
DEFENDANT'S MOTION ( )

TYPE OF MOTION: Motion for an Extension of Time to Respond to Town's Motion to Dismiss and/or Strike and For More Definite Statement.

ACTION TAKEN: GRANTED (××) DENIED ( )

REMARKS: Plaintiff shall have to and including April 17, 1990, to respond to Defendant's Motion to Dismiss and/or Strike and For More Definite Statement.

FOR THE COURT

DATE: April 12, 1990 By: DEPUTY CLERK

APPENDIX AA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

YOU ARE ADVISED that on the 14th day of February, 1990 the following action was taken by the Court in this case:

DATE MOTION FILED: February 12, 1990

PLAINTIFF'S MOTION ( )
DEFENDANT'S MOTION (××)

TYPE OF MOTION: Motion for Enlargement of Time.

ACTION TAKEN: GRANTED (××) DENIED ( )

REMARKS: Defendant TOWN OF LONGBOAT KEY shall have to and including March 5, 1990, to respond to the Complaint.

FOR THE COURT

DATE: February 14, 1990 By: DEPUTY CLERK

APPENDIX BB

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

[Dec. 12, 1991]

ORDER

It is ORDERED that:

(1) When a witness takes the stand, the examining attorney shall read such background information as he desires to give concerning the witness and the connection of the witness to the litigation, and then shall solicit a response from the witness as to the correctness thereof. The second question should address the issues in litigation.

(2) In all civil cases where an expert witness, other than a treating medical expert, is to testify in person, the witness' direct testimony shall be reduced to writing and a copy thereof submitted to the trial judge and to opposing counsel at least five (5) days before trial. Such written statement shall contain every material fact and/or opinion to which the witness would testify on direct examination if he were asked the appropriate questions. When the witness is called to testify at trial, he shall be sworn in the usual fashion. His qualifications as an expert shall

be recited by the attorney who has called him. Thereafter, the attorney may interrogate the witness as to specific qualifications of expertise which have direct bearing on the subject matter of the case. If objection to the witness' qualifications is raised, the trial judge shall rule upon such objection prior to any further testimony by the witness. Prior to such ruling, the objecting party may conduct a voir dire as to qualifications. Unless objection is raised to the qualifications of the witness as an expert, the witness shall then read the written statement aloud to the trier of facts. During the reading of the statement, the witness may refer to a mechanical device, drawing, chart, photograph, or other exhibit in order to explain the testimony. After the witness has read his prepared statement, the attorney who has called him as a witness may ask him additional questions to further explain his opinion. However, the witness may not proffer any opinion not encompassed in the written statement. At the conclusion of the witness' direct examination in the manner described above, opposing counsel shall be given the opportunity to cross-examine him in the usual fashion.

The above rules will facilitate the trial of these cases and will be rigidly adhered to.

It is further ordered that a calendar call will be held on Monday, January 6, 1992, 9:00 a.m., in Courtroom A of the Sixth Judicial Circuit Courthouse in St. Petersburg, Florida, at which time all attorneys of record in this matter will appear.

L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE
FOR THE MIDDLE DISTRICT
OF TENNESSEE, SITTING BY
ASSIGNMENT IN THE MIDDLE
DISTRICT OF FLORIDA

APPENDIX CC

STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV provides, in pertinent part,: "nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

Longboat Key Code, Sections 150.34(B) and (C) provide:

(B) A building permit heretofore issued shall be revoked and written notice give to the person holding the permit, if the construction authorized by the permit is not commenced within 60 days after the date the permit is issued, or if at any time after construction is commenced the work is suspended or abandoned for a period of 30 days.

Construction shall be deemed to have been "*COMMENCED*" when any work is started on the site preparation (only that work necessary for construction of buildings or structures) after issuance of the building permit or building and structures in accordance with approved development or construction plans. For purposes of this section, clearing of the site, installation of utilities and other similar activities not necessary for the actual construction of buildings shall not be deemed to be site preparation. Construction shall be deemed to have been "*SUSPENDED*" or "*ABANDONED*" when no substantial work has been accomplished in any 30-day period.

(C) A building permit can be extended prior to revocation or, if a building permit is revoked for any of the reasons provided in division (B) of this section, the permit can be revalidated within 20 days of the revocation. The Public Works Director may extend or revalidate a permit for no more than 6 consecutive periods of 30 days

each, but only if there is a finding on the part of the Director of just cause for the delay. For purposes of this section, "JUST CAUSE" shall be found only if special conditions and circumstances exist which do not result from the voluntary actions of the person holding the permit, his representatives or agents, which have caused an unforeseeable delay in the ability of the person holding the permit to proceed with construction of the project. Economic conditions or financing problems, absent other relevant considerations, shall not form the basis for a revalidation or extension of a building permit. In the event that the suspension, abandonment, or failure to commence construction has exceeded any revalidation or extension period or periods, a new building permit must be obtained from the Building Department before work may be resumed. If changes have been made or will be made in plans previously approved by the town or if amendments have been made to Chapter 158 or in any other relevant ordinance or law, a new permit will not be issued until the proposed changes in the project have been approved by the town and any requirements of new relevant ordinances or other legal requirements have been satisfied.

Longboat Key Code, Section 158.032 provides:

If any person is in doubt whether rights have vested for a proposed development on property owned by that person, based on the granting of any development order by the Town of any of its commissions, agencies or departments, the property owner may request a determination from the Town Commission. For the purposes of this provision the term "vested rights" shall be interpreted to include those rights obtained by a property owner who: 1) in good faith; 2) upon some act or omission of the government; 3) has made such a substantial change in posi-

tion by incurring such extensive obligations and expenses that it would be highly inequitable and unjust to destroy to acquired right. In making its determination the Town Commission shall assess each request for a vested rights interpretation on the particular facts relating to that case. Notwithstanding, anything in this provision to the contrary, if the Town of Longboat Key shows that a new peril to the health, safety, morals or general welfare of the residents or property in the Town of Longboat Key has arisen subsequent to the approval of any development order, the development order may be revoked.

APPENDIX DD

COMPOSITE OF VARIOUS PAGES OF PRETRIAL STIPULATION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE RESERVE, LTD.,

Plaintiff,

vs. CASE NO. 90-85-CIV-T-10B

TOWN OF LONGBOAT KEY,

Defendant.

_____/

PRETRIAL STIPULATION

EXCERPT

9. *A Concise Statement of those Issues of Fact which Remain to be Litigated*:

EXCERPT

(13) Whether the Town is estopped from revoking the building permit because the Reserve has made such a substantial change in its position, in good faith reliance upon the Town's actions, so that it would have been highly inequitable and unjust to destroy the rights the Reserve had acquired?

EXCERPT

The parties reserve the right to complete, correct or amend any section of the Pretrial Stipulation prior to trial.

DATED: January 2, 1992

DONALD E. HEMKE
Florida Bar No. 305057
CARLTON, FIELDS, WARD, EMMANUEL, SMITH
& CUTLER, P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000

DATED: January 2, 1992

EDWARD F. RYAN
Florida Bar No. 438855
BURKE, BOSSELMAN & WEAVER, P.A.
1900 Glades Road
Suite 350
Boca Raton, Florida 33431
(407) 391-0400

Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-784

In The

Supreme Court of the United States

October Term, 1994

THE TOWN OF LONGBOAT KEY,

Petitioner,

v.

THE RESERVE, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

DONALD E. HEMKE
CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER, P.A.
One Harbour Place
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LISTING OF PARTIES

The Reserve, Ltd., is a Florida limited partnership. The Reserve Development Corporation, a Florida corporation, is the general partner. Dr. Murray Klauber is the only shareholder in The Reserve Development Corporation. Dr. Murray Klauber is the only limited partner in The Reserve, Ltd.

TABLE OF CONTENTS

Page

CONCISE STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

1. The case is not ripe for review 8

2. The courts of appeals are unanimous that a government cannot constitutionally revoke a building permit to retaliate against a landowner for exercising his constitutional rights 9

3. The Eleventh Circuit's decision is fact-specific and very narrow..... 20

4. The Town's fears that federal courts have become "zoning boards of appeal" are hyperbole 21

5. The Town's petition, at bottom, is a claim that the Eleventh Circuit erred in applying Florida law..... 24

6. The Town's claim that it did not act arbitrarily and capriciously is outside the scope of the question presented but, in any event, there certainly was sufficient evidence that the Town acted arbitrarily and capriciously to survive the Town's motion for summary judgment 26

7. Even were the Eleventh Circuit incorrect on whether Florida law recognizes a property interest here, the Reserve need not have a property interest where, as here, the government retaliates against a landowner for exercising constitutional rights..... 28

TABLE OF CONTENTS – Continued

Page

8. Even were this Court to grant the petition for certiorari and hold that the Reserve has no substantive due process claim for an arbitrary, capricious, and retaliatory revocation, trial would still proceed on the Reserve's equal protection claim..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

American Construction Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372 (1893) 8

Amsden v. Moran, 904 F.2d 748 (1st Cir. 1990) 24

Bello v. Walker, 840 F.2d 1124 (3rd Cir.), *cert. denied*, 488 U.S. 891 (1988) 10, 20

Board of Managers of the Glen Mills School v. West Chester Area School District, 838 F. Supp. 1035 (E.D. Pa. 1993) 11

Board of Regents v. Roth, 408 U.S. 564 (1972).....19, 22

Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988)..... 10, 17, 18, 19

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock Railroad Co., 389 U.S. 327 (1967) 8

Chiplin Enterprises v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983) 24

City of Boynton Beach v. Carroll, 273 So.2d 171 (Fla. 4th DCA), *cert. denied*, 279 So.2d 871 (Fla. 1973) 25

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)..... 12

Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992) 14, 15

Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988)..... 20

Cordeco Development Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976) 11, 12, 18

TABLE OF AUTHORITIES – Continued

Page

Couf v. DeBlaker, 652 F.2d 585 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1992) 27

Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994) 10, 17, 18, 19

Gamble v. Eau Claire County, 5 F.3d 285 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1096 (1994) 13, 14

Gross v. City of Riviera Beach, 367 So.2d 648 (Fla. 4th DCA 1979) 26

Hamilton-Brown Shoe Co. v. Wolf Brothers & Company, 240 U.S. 251 (1916) 8

Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991) 16

Jirau-Bernal v. Agrait, 1994 WL 518147 (1st Cir. 1994) 18

Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) 12

Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1990) 25, 26

Marine One, Inc. v. Manatee County, 877 F.2d 892 (11th Cir. 1989) 25, 26

Monroe County v. Hemisphere Equity Realty, 634 So.2d 745 (Fla. 3rd DCA 1994) 26

Neiderhiser v. Borough of Berwick, 840 F.2d 213 (3rd Cir.), *cert. denied*, 488 U.S. 822 (1988) 10

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 13, 14, 23

Perry v. Sindermann, 408 U.S. 593 (1972) 12, 29

Pickering v. Board of Education, 391 U.S. 563 (1968) 12

TABLE OF AUTHORITIES – Continued

Page

RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989) 13, 17

Rankin v. McPherson, 483 U.S. 378 (1987) 11, 28

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 15, 16

Ross v. Moffitt, 417 U.S. 600 (1974) 24, 27

Scott v. Greeneville County, 716 F.2d 1409 (4th Cir. 1983) 16, 17

Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986) 16

Smithfield Concerned Citizens v. Town of Smithfield, 807 F.2d 239 (1st Cir. 1990) 20

South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir. 1974), *cert. denied*, 419 U.S. 837 (1974) 27, 28

Syvlia Development Corp. v. Calvert County, 842 F. Supp. 183 (D. Md. 1994) 27, 28

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 13

Virginia Military Institute v. United States, 113 S. Ct. 2431 (1993) 8

Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983) 10

Zaintz v. City of Albuquerque, 739 F. Supp. 1462 (D.N.M. 1990) 11

CONCISE STATEMENT OF THE CASE

The Town's statement of the case attempts to make this a garden-variety land use case. Given more than 4,500 pages of deposition testimony, over 5,000 pages of exhibits, and the Eleventh Circuit's opinion in the subject case, the Town should know better.

Briefly put, the facts are that in February 1986, the Town commission passed a resolution approving a site plan for the Reserve to construct 72 condominium units and a world class spa on privately-owned property within the Town. In February 1987, the Reserve obtained a building permit to construct the first 57 of the condominium units and the spa. In March 1987, the Reserve received a building permit to demolish 102 units in 23 preexisting buildings on the subject property in order to proceed with constructing the condominium units and spa. In April 1987 and again in November 1987, the Town commission approved revised and amended site plans for the condominiums and spa, again specifically finding that the site plans were consistent with the Town's comprehensive plan, with the Town's zoning, and with good design standards. In reliance upon the Town's approvals and building permits, the Reserve spent well over $6 million in financing the subject property, in designing the world class spa and condominiums, in demolishing the pre-existing buildings, in site work and grading, and in construction, including more than 400 pilings and pile caps.

By the mid 1980s, Dr. Murray Klauber, the principal in the Reserve, had become the object of the Town's

attention due to his primary identification with the commercial/tourism industry in the Town, a highly controversial and politicized subject in the Town, and due to his political activities within the Town. As the Eleventh Circuit summarized,

> "[t]hroughout the 198Os, Reserve's principal, Dr. Murray Klauber ("Dr. Klauber"), was involved in numerous disputes with Longboat Key over matters unrelated to the spa project. In addition, Dr. Klauber was active in politics in Longboat Key in the 1980s. Beginning as early as 1984, Dr. Klauber opposed the candidacy of several members of the Longboat Key Commission. By 1988, Dr. Klauber's relationship with Longboat Key was, at best, strained" (Town appendix at 3).

More specifically, as early as 1984, Dr. Klauber visibly and financially had backed candidates opposing Commissioners Fernald, Pollock, Wurzburg, and Stewart (the four commissioners who in 1988 and 1989 would be involved in revoking and refusing to reinstate the building permit for the condominiums and spa). Dr. Klauber was instrumental in March 1985 in helping to defeat the no-growth, anti-tourism, anti-commercial candidates for the Town commission. In 1986, Dr. Klauber made accusations that "an invisible government" of non-elected persons was controlling the Town commission. In March 1986, however, the no-growth, anti-tourism, anti-commercial candidates were elected and resumed control of the Town commission. Shortly thereafter, the Town became involved in numerous disputes with Dr. Klauber, including disputes concerning flying American flags and installing speed bumps to protect children at the Colony Beach

and Tennis Resort which Dr. Klauber operated. Dr. Klauber has been involved in politics in the Town, even though Town employees have advised him that it would be in his best interests to stay out of politics. Town employees testified that Town commissioners "definitely expressed prejudices" against Dr. Klauber, had "negative attitudes against Dr. Klauber," and "viewed Dr. Klauber as a political adversary."

Notwithstanding the Reserve's substantial work and expenditures in connection with constructing the subject project and in order to retaliate against Dr. Klauber in light of his political activities, his identification with commercial tourism within the Town and the disputes between Dr. Klauber and the Colony, on the one hand, and the Town, on the other hand, the Town proceeded to thwart the Reserve's attempt to develop the subject property. Specifically, on May 10, 1988, the Town notified the Reserve that it had until June 5, 1988 (a Sunday) to accomplish "substantial work" on the subject property even though the Reserve had until February 1990 to complete construction of the subject project pursuant to the Town's approval of the site plans and even though the Town had never enforced the ordinance requiring "substantial work" every 30 days. In light of its substantial financing and construction commitments concerning the subject property, the Reserve immediately contacted the Town upon receiving the notification to determine what the Town considered "substantial work." In reliance upon the Town's representations, the Reserve contracted and prepaid to have five pile caps constructed. By June 3, 1986, the contractor was working on the pile caps, had done stakeout, and had forms and materials on site.

Notwithstanding the facts that "substantial work" was being done, that the contractor had informed the Town that work was proceeding on the caps, that one cap was poured, and that the other four caps would be poured forthwith, that the contractor had, in fact, a backhoe and four men working on the caps on the morning of June 6, 1988 (a Monday), and that the Town knew that revoking the permit would cause substantial damages to the Reserve, the Town purported to revoke the building permit for the 57 condominium units and spa on Monday morning, June 6, 1988.

Immediately thereafter, Dr. Klauber asked the Town's public works director what could be done to have the permit reinstated. The public works director responded that the permit would never be reinstated. On June 22, 1988, the Reserve notified the Town in writing that the Town improperly revoked the building permit, but hoped the matter could be resolved amicably. The Town, rather than reinstating the building permit as was its practice even where building permits had been revoked after many months of no activity, reconfirmed its decision to revoke the building permit. Not only did the Town refuse to reinstate the building permit, the Town called upon the Reserve's letter of credit for $157,772 purportedly to *remove* the 400-plus piling which the Reserve had installed on the subject property even though the pilings could be cut off at much less cost, even though there was no public interest in removing the pilings from the subject property, and even though it would be unprecedented to remove the pilings from the subject property.

Other evidence indicating that the subject case is far from a garden-variety land use case and that the permit

revocation here was arbitrary, capricious and irrational and was designed to retaliate against Dr. Klauber were the facts that (1) the Town did not revoke building permits on other projects (Cedars, Beaches, Promenade) even though there were periods of no activity substantially longer than 30 days (no activity for well over one year at Promenade and Beaches and for over nine months at Cedars), (2) no witness, including seven Town employees, could cite one single incident, in Longboat Key or elsewhere, where a government has revoked a building permit where, as here, workmen and equipment were on site, (3) even where permits were ultimately revoked *after many months of inactivity* at Cedars and Promenade, the Town reinstated those permits, (4) the Town told the Reserve on *May 10, 1988,* that it had *30 days* to complete five pile caps, but revoked the permit on *June 6, 1988,* (5) the Town applied *ex post facto* an ordinance it passed on May 19, 1988, in revoking the permit, (6) the Town's public works director testified that he "would have no reason to revoke" a permit if workmen were on-site, as here, (7) the Reserve, as approved, was consistent with the Town's comprehensive plan, the Town zoning code, and good design standards, (8) the Reserve, as permitted, would have been favorable for Longboat Key, (9) the Town singled out the Reserve to be monitored daily, (10) the Town insisted for almost 13 months that the Reserve pull some 400 pilings from 40 to 50 feet into the ground, rather than cut the pilings off at ground level, even though pulling the pilings would cost the Reserve at least $150,000, compared to $30,000 to cut the pilings, even though no witness, including six Town employees, could cite one single incident, in Longboat Key or elsewhere,

where a government has attempted to make a landowner "restore" a site by pulling pilings from the ground rather than cutting pilings off, and even though the Town permitted other landowners to "restore" properties by cutting pilings off, (11) virtually the only two reprimands ever to Town employees stemmed from their involvement in issuing the building permit to the Reserve, (12) shortly after the building permit was issued, the Town began an "investigation" into the issuance of the building permit, the only such investigation ever in Longboat Key, (13) Commissioner Fernald suggested to the Town manager that Mr. Lovett should be fired for issuing the building permit to the Reserve, (14) the Town manager testified that he was "sick" of Dr. Klauber, and (15) Town officials used to "joke" about requiring the Reserve to "restore" the 23 dilapidated rat-infested buildings of the Far Horizons in order to restore the site.

Because of the Town's revocation of the building permit and the Town's refusal to reinstate it, the Reserve had no choice but to contract to sell the subject property. Because of the Town's revocation of the building permit and the Town's refusal to reinstate it, foreclosure proceedings were begun against the Reserve, the Reserve lost financing, and the Reserve was unable to proceed with the project in light of newly-imposed coastal construction requirements.

In addition to being incomplete and misleading, the Town's statement of the case also strays from the record. There is no support in the record for any of the Town's statements in the last paragraph on page 3 of its petition for certiorari (1) that the Reserve requested a later development approval, (2) that the Town commission

approved a site plan for a new project, and (3) that the Reserve sold the real estate six years later to an unrelated third party.

Finally, although the Town has raised no question concerning "ripeness" in the petition for certiorari, the Town gratuitously claims at pages 2 and 3 of the petition that "[s]everal sections of the Town Code provide relief to the Reserve for the revocation of the permit," that the Reserve never sought revalidation of the permit from the public works director pursuant to Town Code 150.34(C), that the Reserve never requested a vested rights determination from the Town commission pursuant to Town Code 158.032, and that "it is undisputed that Reserve never sought a Town Commission vote regarding the return of its building permit." Again, the Town is simply factually wrong. The Eleventh Circuit noted that, while the Reserve may never have submitted "formal" requests for revalidation and determination of vested rights (Town appendix at 17), the Reserve "did contact Longboat Key on several occasions in an endeavor to have the Permit restored," that "the record is rife with references to informal efforts by Reserve to have its permit returned," and that "Reservo's informal challenges to the revocation of its permit may have rendered a formal request futile. . . . " (Town appendix at 18-19). The Eleventh Circuit left the "question [whether the futility exception applies] for the district court to grapple with on remand" (Town appendix at 19).

REASONS FOR DENYING THE WRIT

1. The case is not ripe for review.

Because the Eleventh Circuit vacated the summary judgment as to Counts II, III, and IV, and remanded to the district court for further proceedings (Town appendix at 20), the subject case "is not ripe for review by this Court." *In Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock Railroad Co.*, 389 U.S. 327, 328 (1967), citing *Hamilton-Brown Shoe Co. v. Wolf Brothers & Company*, 240 U.S. 251, 257-258 (1916) and denying the petition for writ of certiorari, this Court held that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." More recently, in connection with denying the petition for a writ of certiorari in *Virginia Military Institute v. United States*, 113 S.Ct. 2431, 2432 (1993), Justice Scalia observed that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." Justice Scalia cited *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893), where this Court noted that "many orders made in the progress of a suit become quite unimportant by reason of the final result or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Here, the Eleventh Circuit remanded the subject case to the district court, there has been no stay of the Eleventh Circuit's mandate, the mandate has issued, and the district court has directed the

clerk to enter a scheduling order for discovery, p[retrial and trial.

As the Reserve points out at pages 9-20 below, there is no split of authority. Even assuming, however, that the Town were correct and that a split of authority exists, this case presents an inauscpious vehicle for resolving the split. There has not yet been a full-development of the factual record, such that this Court would have the full benefit of findings on the Town's motives and actions – findings that this Court would then be able to apply to whatever legal standard this Court might choose to adopt. Given this case's current posture – including the fact that it has been remanded on issues not raised in the subject petition for certiorari – it is clearly not yet a suitable vehicle for addressing the legal issue sought now to be raised. Thus, this Court should deny the Town's petition because the petition is not ripe.

2. The courts of appeals are unanimous that a government cannot constitutionally revoke a building permit to retaliate against a landowner for exercising his constitutional rights.

The Town claims that the United states Courts of Appeal are "split over when to invoke substantive due process in land use cases" (petition at 4). Though there may be some nuances and differences within the courts of appeals, case law is clear that the courts of appeals universally provide constitutional protection where, as here, a government attempts to retaliate against a landowner for exercising constitutional rights.

Without exception, federal courts have held that governments cannot use land use and zoning to punish a landowner for exercising his constitutionally protected rights of political involvement and of free speech. *See, e.g., Gagliardi v. Village of Pawling*, 18 F.3d 188, 194-195 (2d Cir. 1994) (reinstating complaint that village's zoning enforcement actions "were motivated by or substantially caused by the Gagliardis' exercise of their First Amendment rights"); *Brady v. Town of Colchester*, 863 F.2d 205, 208, 215, 216 (2d Cir. 1988) (reversing summary judgment where landowner claimed permits denied "for purely *political and improper reasons*," and for "impermissible political animus"); *Bello v. Walker*, 840 F.2d 1124, 1129-1130 (3rd Cir.), *cert. denied*, 488 U.S. 891 (1988) (reversing summary judgment against landowner's due process claims; "The deliberate and arbitrary abuse of government power violates an individual's right to substantive due process. . . . [Plaintiffs] presented evidence from which a fact finder could reasonably conclude that certain council members . . . improperly interfered with the process by which the municipality issued building permits, and that they did so *for partisan political or personal reasons* unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation. . . . "); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217 (3rd Cir.), *cert. denied*, 488 U.S. 822 (1988) (holding that denial of "special zoning exemption based on an *improper reason* – the fact that Hollywood as part of its business rented and sold x-rated movies . . . deprived Hollywood of its right to free expression and due process"); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir.

1983) ("[t]he regular and impartial administration of public rules . . . prohibits the subtle distortions of prejudice and bias as well as gross governmental violations exemplified by bribery and corruption *and the punishment of political and economic enemies through the administrative process*"); *Cordeco Development Corp. v. Santiago Vasquez*, 539 F.2d 256, 260 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976) (holding that landowner was denied due process when permit denial was "based on *illegitimate political considerations*," "there was ample evidence that [government officials] acted *maliciously* and wantonly, and with *illegitimate political, or at least, personal motives*"); *Board of Managers of the Glen Mills School v. West Chester Area School District*, 838 F.Supp. 1035, 1046 (E.D. Pa. 1993) ("[w]hile the existence of bias, bad faith, or an improper motive is a strong indicator that a particular governmental action was arbitrary or irrational, any governmental land use decision which is based on considerations other than those related to land use planning may form the basis for a substantive due process claim"); *Zaintz v. City of Albuquerque*, 739 F.Supp. 1462, 1470-1471 (D.N.M. 1990) (denying summary judgment against substantive due process claims where city required plaintiff to "strictly comply," but permitted plaintiff's competitor to be "in clear violation" due to "*political favoritism*" or "motivated by political or other arbitrary reasons").

The lower federal courts' consistent rulings are certainly consistent with precedent from this Court. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 383 (1987) (holding that discharge of clerical employee in constable's office for remarking that "[i]f they go for [President Reagan] again, I hope they get him" was unconstitutional; "[e]ven

though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional rights to freedom of expression"); *Cleburne v. Cleburne Living Center. Inc.*, 473 U.S. 432, 447 (1985) (indicating that government action "to harm a politically unpopular group is not a legitimate state interest"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially his interest in freedom of speech. . . . "); *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968) ("a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal").

Notwithstanding the Town's claim in its petition, almost all federal courts of appeals have held that "an arbitrary, capricious or illegal denial of a building permit states a substantive due process claim under § 1983. . . . " even in the absence of a retaliatory claim as is involved here. *Littlefield v. City of Afton*, 785 F.2d 596, 604 (8th Cir. 1986). In fact, as the Eighth Circuit has observed, "all but the First Circuit generally recognize such claims." *Id.* Indeed, the Eighth Circuit noted that even the First Circuit has recognized such a claim where the government had failed to act due to "illegitimate political considerations." *Id.* at 605, citing *Cordeco Development*. The Eighth

Circuit went on to note that it was "persuaded by the almost unanimous decisions of our sister circuits that the denial of a building permit under some circumstances may give rise to a substantive due process claim." *Id.* at 607.

Again, those lower court decisions are consistent with this Court's precedent. As this Court has noted, a landowner has the constitutional right "to be free of arbitrary or irrational zoning decisions." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S, 252, 263 (1977).

The Town claims that the subject case "squarely conflicts" with *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989), *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), and *Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1096 (1994) (petition at 6). There is no conflict. In *RRI*, the Second Circuit, in a two-to-one decision, held that a permit *applicant* had no "such . . . clear entitlement to the permit to establish a property interest. . . . " 870 F.2d at 912. The Second Circuit pointed out that property may include "not only what is owned but also, in some limited circumstances, what is sought." 870 F.2d at 915. Here, of course, the Town had issued the permit, and the Reserve had expended more than $6 million in reliance on the permit, thereby establishing the property interest as a matter of Florida law. *Pearson* specifically disavowed the district court's "rationale that all federal zoning cases should be treated as 'takings'." Rather, the Sixth Circuit in *Pearson* noted that the district court's rationale "cannot be reconciled with current controlling precedent." 961 F.2d at 1214. The Sixth

Circuit went on to write that "the existence of such a [substantive due process] right is too well established to be gainsaid. The Supreme Court in recent years has at least thrice reaffirmed a general right of substantive due process, stating that the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'." 961 F.2d at 1220. As the Sixth Circuit envisioned in *Pearson*, the Reserve here has pursued a proper claim against "arbitrary, wrongful government action." *Gamble* did not discuss "property interests" at all, but simply held, on the facts there, that failing to pursue state judicial remedies precluded plaintiff's takings and substantive due process claims. *Gamble* did acknowledge, however, that "[s]tatutes or other exertions of governmental power that lack a rational basis, in the sense of some connection however tenuous to some at least minimally plausible conception of the public interest, are held to violate due process even if there is no procedural irregularity; so if they deprive someone of life, liberty, or property, they give rise to a claim under the due process clause." 5 F.3d at 287. Again, *Gamble* supports, rather than undercuts, the Reserve's substantive due process claims.

The Town misplaces its reliance on *Collins v. City of Harker Heights*, 112 S.Ct. 1061 (1992). *Collins* simply held that a city employee has no remedy under Section 1983 because the city failed to train or warn its employees about known hazards. This Court suggested, however, that an employee *would have a claim "if . . .* the City had given an employee a particularly dangerous assignment *in retaliation for a political speech. . . . "* 112 S.Ct. at 1065.

This Court noted that the complaint did "not charge the city with a willful violation of Collins' rights" or that the city "*deliberately* harmed her husband." 112 S.Ct. at 1068-1069. This Court noted that due process was "intended to secure the individual from the *arbitrary* exercise of the powers of government;" "historically . . . due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." 112 S.Ct. at 1069 n. 10. Here, the Town's actions have been retaliatory, arbitrary, and deliberate. Certainly, due process bars those actions.

The Town also attempts to rely on *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). *After a four-day bench trial*, the district court in *Ewing found* that there was *no evidence of* "bad faith, ill will or *other impermissible ulterior motives*," and "no arbitrary or capricious action." 106 S.Ct. at 510, 511. The issue, this Court noted, was "whether the record compels the conclusion that the university acted *arbitrarily*. . . . " 106 S.Ct. at 513. This Court suggested that the student would have had a claim had the regents "conceal[ed] . . . *constitutionally impermissible reasons* for expelling Ewing." 106 S.Ct. at 513. This Court noted that the university had dismissed 19 other students from the program without permitting any of them to take the standardized test. 106 S.Ct. at 515 n. 14. There simply is no conflict with *Ewing*. First, *Ewing* involved review of district court findings of fact, not of a summary judgment. Second, unlike in the subject case, there was no evidence of "impermissible ulterior motives" or "arbitrary and capricious" government action in *Ewing*. Third, the record here indicates that the

Reserve has been singled out, rather than being one of twenty students similarly treated, as in *Ewing*.

The Town has misplaced its reliance on *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1190-1120 (10th Cir. 1991). The Tenth Circuit in *Jacobs* recognized that a landowner has a substantive due process claim for decisions which are "arbitrary and capricious," but simply found that the landowners "did not allege facts sufficient to demonstrate that the commission's refusal to rezone appellants' property violated that standard." Here, on the other hand, the Reserve has filed almost 10,000 pages of depositions and exhibits "rife" with evidence that the Town has acted arbitrarily, capriciously, and retalitatorily in revoking the building permits.

The Town also has misplaced its reliance on *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986). In *Shelton*, the Fifth Circuit noted that "[a]lthough finding that there might be some 'inferences,' 'allegations,' and 'a scintilla of evidence' in the record, the [district] court concluded that 'there [was] no evidence that the refusal to grant the variance . . . was arbitrary or capricious." 780 F.2d at 478. Here, the Eleventh Circuit observed that the record was "rife" with evidence that the Town mistreated Dr. Klauber and the Reserve.

The Reserve cannot understand the Town's reliance on *Scott v. Greeneville County*, 716 F.2d 1409 (4th Cir. 1983). The Fourth Circuit specifically held that "Scott's substantial expenditures in preparation for obtaining the permit and pursuing the then-conforming low-income housing project, coupled with prior official knowledge and informal approval of his intention to build such housing, more

than amply entitled him to claim a 'vested right' to a permit. . . . " 716 F.2d at 1418 n. 10. Further, the Fourth Circuit held that "[t]he record unequivocally establishes that Scott was deprived of his building permit by the extraordinary and unlawful intervention of the county's highest governing body into the issuance process." 716 F.2d at 1419. The Fourth Circuit went on to hold that, "even if [Scott] fails to prove racially discriminatory motivation, he has been denied due process of law . . . by manifest arbitrariness and unfairness." 716 F.2d at 1420-1421.

The Town claims at page 9 that the subject case would not invoke substantive due process analysis in the Second Circuit in light of *RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d 911, 918 (2d Cir. 1989). *RRI Realty* simply held that an applicant for a building permit did not have a sufficiently clear entitlement to the permit to constitute a property interest. That, too, may have been the result in the Eleventh Circuit had the Reserve only been an applicant for a permit. But, as the Eleventh Circuit ruled, it was the Reserve's holding of the permit and multi-million dollar expenditures in reliance on the permit that gave rise to the property interest as a matter of Florida law (Town appendix at 10-14).

The Town claims the subject case "would have been summarily drummed out of federal court" in the Second Circuit and that the subject case would not invoke substantive due process analysis in the First Circuit (petition at 9). The Town is wrong. The Town fails to call this Court's attention to *Brady v. Town of Colchester*, 863 F.2d 205, 208, 215, 216 (2d Cir. 1988), *Gagliardi v. Village of*

Pawling, 18 F.3d 188, 194-195 (2d Cir. 1994), *Cordeco Development Corp. v. Santiago Vasquez*, 539 F.2d 256, 260 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976), and *Jirau-Bernal v. Agrait*, 1994 WL 518147 (1st Cir. 1994). In *Brady*, the Second Circuit reversed a summary judgment because plaintiffs produced sufficient evidence to support their substantive due process claim arising out of the denial of permits in order to prevent plaintiffs from renting to a particular political party. In *Brady*, the Second Circuit specifically noted that "[i]n zoning dispute cases, the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational zoning actions." 863 F.2d at 215. The Second Circuit in *Brady* was "mindful of the general proposition that 'federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations,' " but also noted that "when a landowner's constitutional rights are infringed by local zoning actions, our duty to protect the constitutional interest is clear." 863 F.2d at 215. In reversing the summary judgment, the Second Circuit "[did] not suggest . . . that a wronged party has a valid claim for a constitutional deprivation every time a local zoning board makes an incorrect decision regarding a zoning permit," but that plaintiffs may have a constitutional claim where a permit is denied "because of indefensible reasons such as impermissible political animus." 863 F.2d at 216. In *Gagliardi*, the Second Circuit reinstated a complaint that the village's zoning enforcement actions "were motivated by or substantially caused by the Gagliardias' exercise of their First Amendment rights." In *Cordeco Development*, the First Circuit held that a landowner was denied due process where his permit was

denied "based on illegitimate political considerations," and where "there was ample evidence that [government officials] acted maliciously and wantonly, and with illegitimate political, or at least, personal motives." In *Jirau-Bernal*, the First Circuit just recently reaffirmed consistent and long-standing law that government cannot retaliate against citizens for exercising their constitutional rights.

Notwithstanding *Brady* and *Gagliardi*, the Town suggests that the Second Circuit has generally abandoned substantive due process and that this Court adopt the Second Circuit's analysis which supposedly "does not wholly abandon substantive due process analysis, but reserves it for truly egregious cases of abuse of governmental power" (petition at 11, see petition at 6). The Reserve would suggest that revoking and refusing to reinstate a building permit, thereby damaging a property owner well more than $6 million in out-of-pocket costs, in order to retaliate against the property owner for exercising his first amendment rights is, to put it mildly, a "truly egregious case of abuse of governmental power."

The Town further suggests that adopting what it perceives as the Second Circuit's analysis would somehow "greatly curtail the need for federal courts to delve into the quagmire of state laws which may be unclear in defining a property interest" (petition at 11). What the Town suggests is that this Court should overrule *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Roth* has been applied for 22 years. Federal courts often decide questions of state law, whether in diversity cases or under *Roth*.

Finally, the other cases cited in the Town's petition similarly also do not conflict with the cases indicating

that the permit revocation here violated the Reserve's constitutional rights. *Smithfield Concerned Citizens v. Town of Smithfield,* 807 F.2d 239 (1st Cir. 1990), for example, concerned a facial substantive due process claim against a legislatively-adopted zoning ordinance applicable to large portions of the Town, rather than to action against one landowner to retaliate against the landowner for exercising his first amendment rights. In *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988), as another example, the Seventh Circuit, in affirming a dismissal, specifically pointed out that "[t]here is no suggestion that the defendants acted out *of some partisan political motive* that might raise questions under the First Amendment or, one of our sister courts has suggested recently, under some notion of substantive due process, *see Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir. 1988)." The Seventh Circuit went on in *Coniston* to note that "[o]f course if a zoning decision is based on considerations that violate specific constitutional guarantees, it is invalid," and that a zoning decision "can be said to deny substantive due process . . . if it is irrational." *Id.* Here, as the Eleventh Circuit observed, the record is "rife" that the Town "acted out of some partisan political motive" to harm Dr. Klauber.

3. The Eleventh Circuit's decision is fact-specific and very narrow.

The Town concedes that substantive due process applies "in truly egregious cases" (petition at 6), but argues that "[t]his case . . . does not meet any such

minimum threshold of a substantive due process violation" (petition at 7). Whether the subject case meets any such "minimum threshold" is particularly fact-sensitive. The Eleventh Circuit, in reviewing the 10,000-page record on the motion for summary judgment, found that the record was "rife" with the Town's unfairness and hostility to Dr. Klauber and the Reserve, and remanded to the district court for a fuller determination of whether the Town acted arbitrarily and capriciously or retaliatorily. Those determinations are particularly fact-sensitive and do not warrant granting the Town's petition for certiorari.

4. The Town's fears that federal courts have become "zoning boards of appeal" are hyperbole.

The Town fears that "[t]he Circuit Court's holding . . . usurps local permitting authorities of their democratic mandate and legislative power" and "unnecessarily entangles federal courts in the quagmire of sometime incoherent and undeveloped state law," and "ensures into perpetuity that federal courts act as zoning boards of appeal" (petition at 6). The Eleventh Circuit's holding is much, much more narrow. Even the Town acknowledges at page 6 that substantive due process should be applied "in truly egregious cases, not . . . involving the application of state or local discretion to land use issues." Given the Reserve's allegations and the Eleventh Circuit's observation that the record is "rife" with the Town's mistreatment of Dr. Klauber, this truly is an "egregious case," one "not involving the application of state or local discretion to land use issues." The Eleventh Circuit's holding merely ensures that a Town cannot retaliate

against a citizen for exercising his constitutional rights of free speech and political participation. The Town should have no more "discretion" to revoke a building permit, damaging a citizen more than $6 million, because it dislikes the citizen's speech and political participation, than should the Town be able to confiscate a citizen's real property because it dislikes the citizen's speech and political participation.

The Town claims that the "current state of the law results in a disruption of local government land use planning and zoning, unfairness and uncertainty to litigants across the county [sic], and the unnecessary entanglement of federal courts in state zoning and [land] use law" (petition at 6-7). The Reserve would suggest that the Town's "solution" here would result in substantially greater unfairness to a permitholder whose permit has been revoked due to the permitholder's exercise of his constitutional rights. The Reserve also would suggest that the subject case does not "unnecessar[ily] entangle . . . federal courts in state zoning and [land] use law." Rather, the subject case only ensures that federal courts continue their longstanding rule in protecting constitutional rights.

The Town also suggests that adopting the Second Circuit's analysis "w[ould] permit local permitting authorities to exercise their legislative prerogative without undue federal interference, and [would] prevent federal courts from sitting as zoning boards of appeal" (petition at 11). The lower federal courts, applying *Roth*, have permitted local bodies to exercise their "legislative prerogatives," and have refused to become zoning boards of appeal. Indeed, the cases cited at page 12 of the Town's

petition clearly prove that the federal courts have refused to become zoning boards of appeal. As the Sixth Circuit in *Pearson* noted, "[t]he vast majority of [challenges to state land use and zoning decisions] may readily be disposed of on summary judgment . . . thus keeping interference by federal courts with local government to a salutary minimum." 961 F.2d at 1222-1223. The federal courts must, however, be able to act where, as here, the government attempts to penalize the exercise of constitutional rights.

The Town fears that permitting plaintiffs, such as the Reserve, to raise claims that a government has retaliated against landowners will somehow "clog the overburdened federal court system" and that "every plaintiff who can scribble 'Fourteenth Amendment protectable property interest violation' on a complaint [can turn] a local dispute into a federal case" (petition at 12-13). The Town forgets 42 U.S.C. 1988 and FRCP 11 and overlooks the Sixth Circuit's observation in *Pearson* that "[t]he vast majority of [challenges to state land use and zoning decisions] may readily be disposed of on summary judgment. . . . " 961 F.2d at 1222-1223. Moreover, the Town's argument, if accepted, would apply to any constitutional claim – one can go into federal court simply by alleging that government action violates the Constitution. This Court, however, has never endorsed the proposition that, just because some meritless cases asserting constitutional rights may be brought in federal court, the remedy is to bar all cases asserting constitutional rights.

The Town claims that "not every violation of a state statute or local law creates a federal constitutional rights

case" (petition at 13) and that the Eleventh Circuit's holding will "usurp local permitting authorities of their democratic mandate" (petition at 6). The Reserve agrees that "not every violation of a state statute or local law" equates to a "constitutional claim." This case, however, involves retaliating against a property owner for exercising his constitutional rights, not a garden-variety claim for violating a local law. Neither *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524, 1527 (1st Cir. 1983), nor *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990), involved claims of retaliation. The Reserve certainly does not understand the Town's suggestion that a government may have a "democratic mandate" to act arbitrarily and capriciously and to retaliate against a citizen for exercising his constitutional rights.

Simply put, the Town's fears are only "fears" and do not logically indicate that this Court should grant the petition.

5. The Town's petition, at bottom, is a claim that the Eleventh Circuit erred in applying Florida law.

The Town claims that the Eleventh Circuit "wrongly held that the Reserve has a Fourteenth Amendment protectable property interest" (petition at 14). Not only does the Eleventh Circuit opinion and underlying case law indicate that it is the Town (rather than the Eleventh Circuit) which is wrong, but the Town ignores the fact that this Court does not exist to provide another appeal. *See, e.g.*, Supreme Court Rule 10; *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). This is most assuredly so when the

point being contested involves a question of *state*, rather than federal, law. The Eleventh Circuit is well-situated to understand and apply the elements of equitable estoppel and property interests in Florida. Even assuming that the Eleventh Circuit erred, error correction on such issues would be an inappropriate use of this Court's limited docket.

In any event, however, the Eleventh Circuit did not err. Even if the Town were correct that "Florida law at least since 1945 has held that *possession* of a building permit does not create a protected property interest" and that "a *mere application* for a building permit d[oes] not create protected rights" (petition at 14), the Eleventh Circuit certainly was correct in specifically holding that "Florida courts have consistently held that a landowner has a property right in a building permit where the landowner possesses a building permit *and* where the circumstances that give rise to the doctrine of equitable estoppel are present" (Town appendix at 13). Indeed, the Town continues to overlook the language in *City of Boynton Beach v. Carroll*, 273 So.2d 171, 173 (Fla. 4th DCA), *cert. denied*, 279 So.2d 871 (Fla. 1973), that the Eleventh Circuit quoted that "possession of a building permit does not create a vested right . . . *in the absence of circumstances which would give rise to equitable estoppel*" (Town appendix at 13).

The Town also faults the Eleventh Circuit for relying on *Marine One II (Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990)), rather than on *Marine One I (Marine One, Inc. v. Manatee County*, 877 F.2d 892 (11th Cir. 1989)), because the Eleventh Circuit, as the Town puts it, never "overruled" *Marine One I*. The Eleventh Circuit in

Marine One II did, however, "clarify" *Marine One I* to limit *Marine One I* to permits for construction on publicly-owned lands, rather than to permits for construction on privately-owned lands, as is involved here.

The Town further attempts to rely on *Monroe County v. Hemisphere Equity Realty,* 634 So.2d 745 (Fla. 3rd DCA 1994), which simply held, as a matter of Florida law, that the failure to enforce an ordinance and an illegally-issued permit could not give rise to equitable estoppel. Here, it was the Town's affirmative actions in approving the site plans and in issuing the building permits, rather than a mere failure to act, which gave rise to the property interest as a matter of Florida law.

Finally, the Town claims that the Reserve's position is "identical" to the plaintiff's position in *Gross v. City of Riviera Beach,* 367 So.2d 648 (Fla. 4th DCA 1979). The Town is wrong. In *Gross,* there was no question that construction had ceased for substantially more than one year notwithstanding an ordinance providing that a building permit becomes void if construction ceases for 90 days. Here, construction had not ceased – the Reserve had workmen and equipment on-site. Moreover, there was no claim of retaliation in *Gross.*

6. The Town's claim that it did not act arbitrarily and capriciously is outside the scope of the question presented but, in any event, there certainly was sufficient evidence that the Town acted arbitrarily and capriciously to survive the Town's motion for summary judgment.

At page 17 of its petition, the Town strays from its one limited question to claim that the Eleventh Circuit

should have concluded that the Town did not act arbitrarily and capriciously. The Eleventh Circuit certainly was within its discretion in remanding that determination, in the first instance, to the district court in light of the 10,000-page record here. As pointed out at pages 2-6 above, there certainly was ample evidence that the Town acted arbitrarily and capriciously to survive the Town's motion for summary judgment. Even were the Eleventh Circuit wrong, however, this Court does not operate as a second appellate court. *See, e.g.*, Supreme Court Rule 10; *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

As further support for claiming that the Eleventh Circuit should have held that the Town did not act arbitrarily and capriciously, the Town points to the "presumption of validity" of the Town's actions (petition at 18). The Eleventh Circuit certainly dealt with any "presumption of validity" in light of its observation of the 10,000-page record being "rife" with examples of the Town's animosity toward the Reserve and Dr. Klauber (Town appendix at 4). Neither *Couf v. DeBlaker*, 652 F.2d 585, 588 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1992), nor *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir. 1974) (en banc), *cert. denied*, 419 U.S. 837 (1974), nor *Sylvia Development Corp. v. Calvert County*, 842 F. Supp. 183 (D. Md. 1994), are inconsistent with the Eleventh Circuit's holding here. *Couf* recognized a cause of action for "arbitrary and capricious" zoning actions, but simply found that there was no evidence of irrationality there. There could be, and was, no claim in *Couf* that the downzoning was directed against a particular landowner for exercising his constitutional rights because the downzoning in *Couf* applied to all properties within 500 feet of the city's

waterfront. Similarly, *South Gwinnett* recognized a cause of action for "arbitrary and capricious" zoning decisions, but simply found that there was no evidence of arbitrary and capricious action there. The Fifth Circuit specifically noted that "upon a factual showing of arbitrariness there must be some basis in fact and law to justify the zoning action as consistent with reasonableness." Unlike in the subject case, in *South Gwinnett,* there was no evidence that the government had treated other property owners differently or had retaliated against the plaintiff for exercising its constitutional rights. *Sylvia Development* simply was *dictum* that, even if the landowner had a property interest, there was no arbitrary and capricious denial of the development permit on the record there. Once again, *Sylvia Development* did not involve a retaliation claim and it did not involve a case where the government approved the development as being consistent with the Town's comprehensive plan, the Town's zoning, and good design standards only to attempt to revoke the permit once the permitholder's political adversaries were elected.

7. Even were the Eleventh Circuit incorrect on whether Florida law recognizes a property interest here, the Reserve need not have a property interest where, as here, the government retaliates against a landowner for exercising constitutional rights.

Given the Reserve's proof that the Town revoked the building permit to retaliate against the Reserve for Dr. Klauber's constitutionally-protected conduct, the Reserve need not allege and prove an underlying property interest. *See, e.g., Rankin v. McPherson,* 483 U.S. 378, 384 (1987);

Perry v. Sindermann, 408 U.S. 593, 597 (1972). Thus, even were this Court to grant the petition for certiorari and agree with the Town that the Reserve has, as a matter of *state* law, no property interest, the case would still proceed to trial.

8. Even were this Court to grant the petition for certiorari and hold that the Reserve has no substantive due process claim for an arbitrary, capricious, and retaliatory revocation, trial would still proceed on the Reserve's equal protection claim.

The Town's arguments in its petition for certiorari are directed only at the Eleventh Circuit's holding on the Reserve's due process count. The Reserve also raised an equal protection count in Count III. The Eleventh Circuit agreed with the Reserve's argument that

> "the establishment of a constitutionally protectible property interest is wholly irrelevant to an equal protection claim. . . . An equal protection claim revolves around whether similarly situated persons are treated differently. . . . [The] Reserve noted several other developers in Longboat Key [were] allowed to retain their permits despite the fact that *no* work was accomplished on their projects for more than thirty days. Thus, Reserve created a disputed issue of fact regarding whether it had been treated differently than other similarly situated developers.
>
> "Longboat Key argues, however, that 'mere failure to pursue all offenders of an ordinance regulation is not grounds for a claim of denial of

> equal protection.' We have no quarrel with the law so stated. In order 'to prevail on a claim that defendant unequally applied a facially neutral statute, a plaintiff must show intentional discrimination.' Reserve contends that Longboat Key revoked its permit to retaliate against its principal, Dr. Klauber. There is record evidence to support that contention; a disputed fact, as to the reason for the revocation of Reserve's permit, remains. Accordingly, we conclude that the district court erred in granting summary judgment on Reserve's equal protection claim in Count III."

Thus, even were this Court to grant certiorari and to agree with the Town that the Reserve has no substantive due process claim, the subject case would still proceed to trial on the Reserve's equal protection claim.

CONCLUSION

For the foregoing reasons, this Court should deny the Town's petition for certiorari.

Respectfully submitted,

DONALD E. HEMKE
Counsel of Record
CARLTON FIELDS WARD EMMANUEL
SMITH & CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000

Attorneys for The Reserve, Ltd.